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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 476

AMERICAN INSURANCE COMPANY ET AL.,
PETITIONERS,

VS.

EDWARD L. SCHEUFLER (SUCCESSOR), SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, ET AL.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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I. The C. C. A. held that the $8,000,000 "impounded" rate funds should be paid to the policyholders, without any decision (1) as to who owned the funds, or (2) whether or not the prior rates were confiscatory, and the increased rates lawful.

That holding is in conflict with U. S. vs. Morgan, 307 U. S. 183, 193, 197 10

II. The C. C. A. held that the petitioners were not entitled to have the rate controversy decided upon its merits [and the ownership of the $8,000,000 impounded funds thereby determined], on the ground that the petitioners had "unclean hands" which deprived them of any right to ask a court of equity to grant them the equitable relief prayed for in their suits; the misconduct consisting—not of any personal guilt, or of any knowledge, by the companies, or by any of their officers, but solely by charging them with IMPLIED knowledge of the misconduct of an alleged (but disputed) agent, Mr. Street.

The C. C. A. is in conflict with the Circuit Courts of Appeals of the Second and Seventh Circuits in Art Metal Works vs. Abraham & Straus, 107 F. 2d 944, and Hedman Mfg. Co. vs. Todd Protectograph Co., 265 Fed. 273, as well as in conflict with the general Federal and State court rule as stated in Associated Press vs. International News Service, 240 Fed. 983, 989 [affirmed on other grounds in 245 Fed. 244, 248 U. S. 215], and Vulcan Detinning Co. vs. American Can Co., 72 N. J. Eq. 387 14-15

III. The C. C. A. held that the Insurance Companies had unclean hands because of misconduct of Street which had no relationship to the equity of the Insurance Companies involved in the merits of their original suits—which holding is in conflict with the decision of this court in Keystone Driller Co. vs. General Excavator Co., 290 U. S. 240, 245, with the decisions of other Circuit Courts of Appeals on the same matter in Primeau vs. Granfield, 193 Fed. 911, 916 (C. C. A. 2nd); Goodyear Tire & Rubber Co. vs. Overman Cushion Tire Co., 95 F. 2d 978, 982 (C. C. A. 6th); Knapp vs. S. Jarvis Adams Co., 135 Fed. 1008, 1010 (C. C. A. 6th); Bentley vs. Tibbals, 223 Fed. 247, 252 (C. C. A. 2nd), and with the decisions of the Supreme Court of Missouri in Krug vs. Bremer, 316 Mo. 891, 292 S. W. 702, and Stegman vs. Weeke, 279 Mo. 131, 214 S. W. 134 19

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RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioners American Insurance Company and other Fire Insurance companies whose names are signed to this petition, severally petition for a writ of *certiorari* to the Circuit Court of Appeals (8th Circuit) to review its decision in *American Insurance Co.* v. *Scheufler et al.*, 129 F. 2d 143 (R. Vol. V, p. 16), distributing to policyholders over $8,000,000 "impounded" funds (*i. e.* increases in fire insurance rates impounded under interlocutory injunctions)—all (1) without the C. C. A. ever deciding

who owned the $8,000,000 fund, and (2) with the C. C. A. *refusing to decide* whether the increases in rates were lawful or not.

The facts are absolutely undisputed.

This Court has just granted certiorari to review the judgment of the *same* three-judge court (Stone, Otis, Reeves, J. J.) and the *same* C. C. A. (Eighth), which imposed two-year sentences (for contempt of court) upon Pendergast, O'Malley and McCormack. Those three men, in conjunction with one Street (deceased vice-president of five fire insurance companies) perpetrated an outrageous fraud upon the three-judge court; and also perpetrated the same fraud (i) upon all of the attorneys on both sides, to-wit for O'Malley and for the petitioners, and (ii) upon all the present petitioners themselves.

By two-year sentences, the lower courts punished these three living guilty perpetrators of the fraud.

By denying the petitioners here any decision as to their ownership of about eight million dollars "impounded" funds, the *same* lower courts thus punished the petitioners who were wholly innocent and absolutely ignorant* of any facts concerning the fraud.

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*The undisputed evidence (consisting of nearly 100 witnesses testifying in the three-judge court's own elaborate investigation through a Special Master) and the investigations of several grand juries, *First*, established without contradiction that Pendergast, O'Malley, McCormack and Street were the sole perpetrators of the fraud, and, *Second*, established without contradiction that no officer, agent, or employe of any of 134 petitioners knew of or had any connection with (i) any act of Pendergast, O'Malley or McCormack concerning the payment or the receipt of any money directly or indirectly connected with Pendergast, O'Malley or McCormack, or connected in any way with the fraud perpetrated upon the Court, or (ii) with any act of Street concerning the payment of any moneys directly or indirectly connected with the fraud, or for any other purpose, except that the New York and Hartford Companies (54 Companies) advanced to Street $100,000 for the payment of lawyers' fees which Street represented to them he would have to employ because the other lawyers previously employed were *persona non grata* to the Missouri authorities. As to 5 petitioners, Great American Insurance Company, American Alliance Insurance Company, County Fire Insurance Company of Philadelphia, Detroit Fire & Marine Insurance Company, and Massachusetts Fire & Marine Insurance Company, they were equally ignorant except so far as Street's knowledge as an executive officer might be the knowledge of the 5 companies.

As this Court has just granted certiorari to review the action of the lower courts in punishing the three living guilty perpetrators of the fraud, it should also grant certiorari to review the judgments of the same lower courts punishing the innocent petitioners by denying them the right to a decision as to the ownership of the eight million dollars.

The evidence in both sets of cases is the same, except that, in the cases at bar, nearly 100 witnesses affirmatively proved, without contradiction, that none of the 229 officers of the petitioners knew Pendergast, or O'Malley, and that they had absolutely no knowledge of the fraud or of any of the facts connected therewith, perpetrated by Pendergast, O'Malley and Street.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

In May, 1930, the petitioners filed separate suits (consolidated for purpose of appeal, R. Vol. A, p. 16, Vol. V, p. 1) to enjoin the Superintendent of Insurance and Attorney General of Missouri from interfering with the petitioners' collection of a 16 2/3% increase in rates, on the ground that the prior rates were confiscatory; that the 16 2/3% increase was reasonable; and that the threatened acts of the Superintendent of Insurance and Attorney General, and the Missouri Statutes under which they claimed to act, were confiscatory, and unconstitutional under the 14th Amendment.

On July 2, 1930, the 3-Judge Court enjoined any interference with the collection of the 16 2/3% increase, but upon condition that the 16 2/3% increased rates, when collected, should be impounded and paid to the Court's Custodian (R. 19-25, Vol. A); and about $10,000,000 was so "impounded" in the Court's custody.

A Special Master was appointed, and after hearing a great deal of testimony filed separate reports with Find-

ings of Fact and Conclusions of Law in each of the 137 cases which were uniformly favorable to petitioners (R. Vol. A, p. 205, *U. S.* v. *Pendergast*, 28 F. Supp. 601).

On May 18, 1935, C. R. Street, who was Vice President of 5 companies, and Chairman of a small committee which in a supervisory and advisory capacity had charge of the Missouri Rate Litigation, entered into an agreement of settlement under which the Superintendent was to make and file a Rate Order approving, retroactively to June 1st, 1930, 80% of the increase, and disapproving the remaining 20%. Street had specific authority from 54 of the petitioners to make the settlement, but the remaining 85 petitioners gave him no authority, and had no prior knowledge of the settlement. He assumed to act for them.

On February 1, 1936, the District Court upon motion for decrees based upon this Rate Order, and upon a Stipulation of the parties entered a Consent Decree in each case, by which it was ordered that 80% of the monies which had been impounded pursuant to the Interlocutory Injunctions should be paid to petitioners, and 20% to the policyholders, and that each case be dismissed (R. Vol. A, p. 212).

Early in 1939, as the result of the accidental discovery of certain facts, and after an exhaustive investigation conducted by the Bureau of Internal Revenue, and by the Justice Department, it was discovered that C. R. Street had paid $440,000 to one T. J. Pendergast, a Missouri political boss, to bring about a settlement of the Missouri rate litigation, and that Pendergast had paid to the Superintendent of Insurance a substantial sum out of this $440,000. Street had obtained $100,000 of this $440,000 from 54 of the petitioners and their authority to settle the litigation upon representations made to their Executive Officers that conditions in the fire insurance business in Missouri were chaotic, the rate litigation should be settled, that the attorneys representing the petitioners had become *persona non grata* in the State of Missouri, and that he would have to employ new lawyers. He promised a

complete accounting when the whole matter was closed.

Under the final decrees 30% out of the 80% going to petitioners was paid to Street and R. J. Folonie, as Trustees, to take care of certain expenses. In March, 1936, Street and Folonie distributed 11% out of this 30% to petitioners. At the time this distribution was made, Street, without knowledge of Folonie, and upon the misrepresentation that he had incurred additional legal expense, asked petitioners to pay back 5% out of this 11%.* Without question, and as a routine matter, every one of the Insurance Companies so requested, gave checks to Street for this 5%, thus providing him with approximately $340,000 which he paid to Pendergast. On October 28th, effective November 11, 1935, complete new rate schedules were filed and approved by the Superintendent, thus doing away with the necessity for further impounding.

No representative of any of the petitioners had any knowledge of Street's promises to pay Pendergast, or of the payments made by him to Pendergast, and Street himself did not know that any of the money which he had promised to pay Pendergast, or which he paid to Pendergast, was to go to the Superintendent of Insurance.

When petitioners first learned of the misconduct of Street, and about April 8, 1939, they decided to present in the District Court the whole situation regarding the February 1, 1936, Consent Decree, but upon being advised that any action they might take might hamper the United States, they delayed action until after Pendergast and O'Malley pleaded guilty (Vol. A, pp. 238, 239, 242, 244).

On May 29, 1939, the Superintendent of Insurance without prior notice to petitioners filed in each of the 137 cases a motion that the petitioners be cited to show cause why the decrees of February 1, 1936, should not be set aside to the extent of the distribution made thereunder, and that the petitioners, and each of them, be ordered to

*The 54 companies who had advanced the $100,000 were advised to deduct from this 5% their previous advancements.

pay to the custodian the full 80% of the impounded funds distributed to them, together with interest.

On the same day, May 29, 1939, the three-Judge District Court, without hearing any evidence, entered in each of the 137 cases two orders. One was upon the motion for citation with the consent of petitioners, and by it the petitioners were ordered, on or before July 1, 1939, to pay to the custodian all amounts paid and distributed to them, and to Charles R. Street and R. J. Folonie, Trustees. The other order, which was entered on the court's own motion (the motion for citation did not pray for it, and the Superintendent's counsel disclaimed that as one of its purposes) (Vol. A, p. 240), ordered Petitioners to show cause why the impounded premiums should not be restored to the policyholders "and this cause dismissed" (R. Vol. A, p. 251).

Each of the petitioners filed its return to this show-cause order on June 15, 1939. In these returns, after denying that C. R. Street, or any other person, was authorized to commit bribery or to pay any moneys to induce official action, or to consent to so doing, and after denying knowledge of or participation in any supposed bribery, or payment of moneys to induce official action, and after a disaffirmance of any advantage in any wise arising from the decree of February 1, 1936, either upon the settlement or rate order forming the basis thereof, they alleged that the Court could "make distribution of the sums in its possession only according to law to the lawful owners of said monies as may be determined upon an appropriate hearing and determination of the merits of the controversy as set forth in the pleadings of the respective parties and pursuant to the evidence and Master's Report and exceptions thereto"; and prayed that the Superintendent show cause "why the Court should not proceed with the determination of the merits of the controversy between plaintiffs and defendant as in their pleadings set forth" (R. Vol. A, pp. 257, 258).

On July 3, 1939, the District Court appointed a Special Master, before whom the facts above set forth relating to the misconduct of Street, and the lack of knowledge thereof by petitioners, were developed. Some 97 witnesses testified before the Special Master, most of whom were Officers and Executives of petitioners. They were men of the highest standing in the business world. Their reactions in the whole matter were the same, and the Master was satisfied with their credibility (R. Vol. IV, p. 5).

The 3-Judge District Court did not find that any of the petitioners had any knowledge of the misconduct of Street in connection with the settlement, except the five petitioners, of which Street was Vice President and Western Manager,* but that Court found that, with the exception of the five petitioners noted above, petitioners had implied knowledge of Street's misconduct, *i. e.*, they had knowledge of facts which the Court asserted would put a reasonably prudent person upon inquiry, and had reasonably diligent inquiry been made by them they would have discovered that Street was using improper means to obtain a settlement in time to have prevented a fraud upon the Court (Finding of Fact 9, R. Vol. A, p. 409, and Conclusions of Law, B and D, R. Vol. A, p. 410).

The District Court held that because of this alleged implied knowledge the petitioners were in court with unclean hands, and *were not entitled* to have the cases tried on the merits (R. Vol. A, pp. 410, 411, 398 *et seq.*). By its decree entered August 14, 1940, it set aside the 1936 decree entered in each of said 137 cases insofar as said decree directed payment of 80% of the impounded funds to petitioners, and ordered the custodian to pay to the policyholders the funds then in his custody, with interest (Vol. A, p. 412).

The Court of Appeals affirmed this decree.

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*Great American Insurance Company, American Alliance Insurance Company, County Fire Insurance Company of Philadelphia, Detroit Fire & Marine Insurance Company, and Massachusetts Fire & Marine Insurance Company.

JURISDICTION.

The jurisdiction of this Court is invoked by petitioners for writs of certiorari under Section 240 of the Judicial Code, as amended by Act of February 13, 1925, C. 229, Section 1, 43 Stat. 938 (Title 28, U. S. C. A., Section 347), and under the same Act, C. 229, Section 8, 43 Stat. 940 (Title 28, U. S. C. A., Section 350).

THE DATE OF THE JUDGMENT TO BE REVIEWED.

The judgment of the Circuit Court of Appeals affirming the decree of the District Court was entered on the 25th day of July, 1942 (R. Vol. V, p. 26).

QUESTIONS PRESENTED.

I.

Can the 3-Judge Court (1) refuse to determine the merits of the rate controversy, and (2) distribute the funds impounded under the interlocutory injunctions without determination of their ownership?

II.

Did the show cause orders (entered in each petitioner's case) automatically set aside the decrees of February 1, 1936, dismissing the cause, and thereby leave the 3-Judge Court absolutely free to determine the merits of the petitioners' original suits, to-wit, whether the impounded funds should be paid to the policyholders or should be paid to petitioners?

III.

Were petitioners deprived of the right to a decision of their original suits on the merits, by the application to them

of the equitable maxim that "He who comes into equity must come with clean hands," on the ground that the settlement and dismissal of their suits had been procured by the fraud of C. R. Street, which fraud petitioners did not authorize, and of which they had no personal knowledge, and which they repudiated promptly upon the discovery thereof?

IV.

Can the "unclean hands" doctrine be invoked against petitioners upon the basis that they had *implied* knowledge of the misconduct of C. R. Street—the petitioners *not having any personal knowledge* of such misconduct?

V.

Did the misconduct of C. R. Street in fraudulently bringing about a settlement of petitioners' suits, after they were tried and submitted (which fraud petitioners repudiated upon discovery thereof), have an immediate and necessary relationship to the equity which petitioners sought, that is, an adjudication of the ownership of the impounded premiums by a determination of the merits of their original suits, so as to justify the application to them of the "unclean hands" doctrine?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I.

The C. C. A. held that the $8,000,000 "impounded" rate funds should be paid to the policyholders, without any decision (1) as to who owned the funds, or (2) whether or not the prior rates were confiscatory, and the increased rates lawful.

That holding is in conflict with U. S. v. Morgan, 307 U. S. 183, 193, 197.

1. The 3-Judge Court and the C. C. A. (1) ordered the $8,000,000 distributed to the policyholders and (2) refused to decide (*a*) the merits of the rate controversy; or (*b*) who owned the impounded funds; or (*c*) whether the prior rates were confiscatory; or (*d*) whether the increased rates from which the impunded funds arose were reasonable.

Certiorari should be granted, because that holding is in conflict with *U. S.* v. *Morgan*, 307 U. S. 183. In that case a 3-Judge Court (two members being on the 3-Judge Court in the case at bar) impounded a rate fund, arising from the difference between rates collected, and reduced rates ordered.

This court held that such an "impounded" rate fund could not be *ipso facto* distributed to either party, but must abide an ultimate decision as to whether the old, or the reduced, rates were the lawful ones to be charged, saying (307 U. S., at pp. 193, 197):

> "Its action presupposed that the ownership of the excess payments was in doubt and could be finally determined only by an adjudiciation on the merits of the reasonableness of the filed rates. In taking the payments into custody it acted as a court of equity, charged both with the responsibility of protecting the

fund and of disposing of it according to law, and free in the discharge of that duty to use broad discretion in the exercise of its powers in such manner as to avoid an unjust or unlawful result. * * *

While at the moment appellants are content with inaction, and it is appellees who are demanding action—the payment to them of rates whose lawfulness is challenged and not yet determined—the actual posture of the case is **such that the court is under a self-imposed duty to act by virtue of having taken the fund into its possession, and in acting to dispose of the fund it must conform to controlling legal principles"** (Emphasis supplied).

The C. C. A. ignored (without citing it) the rule in the Morgan case.

2. The C. C. A. apparently justified its action upon two theories, the judicial adoption of either of which is a sufficient reason for granting *certiorari,* to-wit:

First: The C. C. A. held that, as the February 1, 1936, Consent Decree ordered "this cause is hereby dismissed" no controversy, or bill in equity, was thereafter before the 3-Judge Court under which it could be asked to decide whether the increased rates were lawful or not; and hence that the insurance companies had no right to ask, and the 3-Judge Court had no right to decide, anything regarding the ownership of the $8,000,000 impounded funds.

On May 29, 1939, the 3-Judge Court, without evidence, but upon the Pendergast and O'Malley "Pleas of Guilty," ordered the Insurance Companies to restore to the Court's custody over $7,000,000, which the Court had distributed to the companies under the February 1, 1936, Consent Decree.

By so doing, the 3-Judge Court *asserted its power* to summarily set aside a Final Decree *more than three years old.* That judicial action automatically set aside the old February 1, 1936, decree, including that part which ordered "this cause is hereby dismissed." Therefore, after May 29,

1939, the February 1, 1936, Consent Decree had been set aside *in toto;* and the 137 Bills in Equity were automatically reinstated, so that the 3-Judge Court had full jurisdiction to decide the causes upon the merits.

On May 29, 1939, the 3-Judge Court recognized that its order of that day (compelling the petitioners to restore to the Court so much of the impounded fund as had been distributed to them under the February 1, 1936, Decree), *automatically set aside* the entire Decree of February 1, 1936, dismissing the causes.

This is so, because:

First: The 3-Judge Court ordered the Companies (in each separate suit) to show cause why this cause should not be dismissed, which would have been senseless unless the February 1, 1936, dismissals *had already been set aside* and the causes reinstated. The petitioners, in their returns to the order to show cause, alleged that to dismiss their causes without an adjudication of the reasonableness of the increased rates, and of the ownership of the impounded funds (upon the merits of their suits) would be "unlawful and inequitable" (R. Vol. A, p. 256) thus accepting the show cause order as meaning what it said.

Second: If the C. C. A.'s theory is correct, [*i. e.*, that the 137 suits had been dismissed and never reinstated, and consequently there was nothing before the Court to decide], then it was senseless for the 3-Judge Court to have appointed a Special Master and have taken 1,600 pages of testimony upon the 3-Judge Court's power to dispose of the impounded funds.

That is a singular contradiction between the 3-Judge Court's theory (towit that they had to take an immense amount of testimony in order to decide what they would do with the impounded funds) and the C. C. A.'s theory (towit, that the 3-Judge Court could not under any circumstances decide anything about the title to impounded funds); and could only return them to the Policyholders,

without any consideration of the merits, or of the circumstances surrounding the entry of the February 1, 1936, Decree.

Moreover under the law, if the dismissals were not automatically vacated by these orders, then every order which the Court made after May 29, 1939, including the show-cause order was absolutely void because it is academic that if there is no case pending a Court has no power to make an order *in it* as distinguished from an order on the decree to effectuate the decree. *Mason* v. *Kansas City Belt Railway Co.*, 226 Mo. 212, 223, 224, 125 S. W. 1128, 1132.

The C. C. A.'s action justifies certiorari in order to prevent the doctrine stated by it from becoming an authoritative statement of the law regarding the power of Federal Courts to modify or set aside ancient decrees or judgments. This is so because:

Third. If the C. C. A. is correct, then (upon application, upon the basis of newspaper publications, or after some supposed result in other litigations), every Federal Court may, at will, set aside any part of any ancient decree it chooses to vacate; and yet, at the same time, leave all the rest of such decree (as the C. C. A. here holds) in full force and effect.*

No such doctrine has ever heretofore been adopted by any Court.

After the expiration of the term at which a Decree is entered, the Court has no jurisdiction to modify it, or to set it aside, except through an independent suit in equity based on certain specified grounds. *In re Metropolitan Trust Company*, 218 U. S. 312, 320; *Delaware, L. & W. R. Co.* v. *Rellstab*, 276 U. S. 1; *O'Connor* v. *O'Connor et al.*, 142 Fed. 449, 450; *Nelson* v. *Meeham*, 155 Fed. 1, 6; *Miocene Ditch Co.* v. *Campion Mining & Trading Co.*, 197 Fed. 497;

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*The term at which these decrees were entered expired April 26, 1936.

Bronson v. *Schulten*, 104 U. S. 410, 415; *Phillips* v. *Negley*, 117 U. S. 665.

In the interest of the orderly administration of judicial proceedings, this Court should determine (1) whether years after a final Decree has been entered, any Court, by its *ipse dixit*, may, without evidence, vacate certain parts of a Decree, disturb the rights of the parties obtained thereunder, and yet leave *other parts* of the same Decree in full force and effect; and (2) whether the Court may simultaneously assert that, because it did not choose to set aside other parts of the same old Decree, the Court is without power to deal with the cause, except as to those parts of the old Decree which it elected to set aside.

Such a doctrine would (*a*) leave every litigant in perpetual helplessness as against a Court's long subsequent determination to vacate an ancient Decree, and (*b*) destroy the established law that a Decree can not be modified after the term except (i) by appeal, or (ii) by independent suit in equity based on certain specified grounds.

II.

The C. C. A. held* that the petitioners were not entitled to have the rate controversy decided upon its merits [and the ownership of the $8,000,000 impounded funds thereby determined], on the ground that the petitioners had "unclean hands" which deprived them of any right to ask a court of equity to grant them the equitable relief prayed for in their suits; the misconduct consisting—not of any personal guilt, or of any knowledge, by the companies, or by any of their officers, but solely by charging them with IMPLIED knowledge of the misconduct of an alleged (but disputed) agent, Mr. Street.

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*Even *assuming* (1) that the Decrees of February 1, 1936 (dismissing the causes), had been *set aside* completely; and (2) that the Bills in Equity with all the Testimony and the Master's Report, *were in full force and effect*—and all pending before the 3-Judge Court, awaiting a decision by it upon the merits.

The C. C. A. is in conflict with the Circuit Courts of Appeals of the Second and Seventh Circuits in Art Metal Works v. Abraham & Straus, 107 F. 2d 944, and Hedman Mfg. Co. v. Todd Protectograph Co., 265 Fed. 273, as well as in conflict with the general Federal and State court rule as stated in Associated Press v. International News Service, 240 Fed. 983, 989 [affirmed on other grounds in 245 Fed. 244, 248 U. S. 215], and Vulcan Detinning Co. v. American Can Co., 72 N. J. Eq. 387.

The C. C. A. said that the petitioners were not entitled to have the rate controversy decided upon its merits, and the ownership of the impounded funds thereby determined, on the ground that

> "they [Insurance Companies] had been guilty of misconduct with reference to these very suits, and a litigant coming into a court of equity must keep his hands clean throughout the litigation" (R. Vol. V, p. 25).

The conflict between the C. C. A. here, and the Second and Seventh Circuits lies in, and is unconsciously concealed by, the ambiguous nature of the term "misconduct."

The 3-Judge Court's searching investigations—through the District Attorney's office, two grand juries, and the testimony of 97 witnesses (covering 1,600 printed pages, and 678 pages of a Special Master's report thereon) established without contradiction that (except for Mr. Street himself) no officer, agent, employee or attorney of any of the 139 Insurance Companies, had any knowledge of Street's misconduct, or use of money, or other wrongful acts, in connection with Pendergast, Superintendent O'Malley, or anyone else.

Nevertheless, the 3-Judge Court and the C. C. A. held the Insurance Companies guilty of "unclean hands" on the ground that they had "implied knowledge" of Street's misconduct; and that the doctrine of "unclean

hands" should be applied to a litigant, not on the basis of his actual participation in, or knowledge of, an agent's misconduct, but because he is supposed to have "implied knowledge" of such "misconduct."

That holding is in direct conflict with the Second and Seventh Circuit Courts of Appeals, and therefore Certiorari should be granted.

In the case of *Hedman Mfg. Co.* v. *Todd Protectograph Co.*, 265 Fed. 273, 278, the Circuit Court of Appeals of the 7th Circuit said:

> "This raises the question whether unfair business practices on the part of an agent, unknown to and unauthorized by his principal, and for which the principal might be liable in damages and to injunctive relief against continuance of the conduct, would, on the 'unclean hands' doctrine, prevent the principal from obtaining equitable relief against the person thus injured by the acts of the agents for unfair trade practices of such person toward the principal. The authorities upon this question are not numerous. A case quite in point is that of *Vulcan Detinning Co.* v. *American Can Co.*, 72 N. J. Eq. 387, 67 Atl. 339, 12 L. R. A. (N. S.) 102, wherein it was said:
>
> > 'That the knowledge possessed by an agent, but not acquired by him while acting for his principal, will under certain conditions be imputed to the latter, is in the nature of a presumption indulged in by courts in working out the rights of litigating parties. * * * An essential part of the presumption in question is that the principal is ignorant of the knowledge that has been casually acquired by his agent. * * * True, he may be bound by it in the sense that his legal rights may be determined with reference to the knowledge with which he is thus chargeable; but his conscience is void of offense, and hence it cannot with any propriety be said that his hands are unclean, for "unclean hands," within the meaning of the maxim of equity, is a figurative description of a class of suitors to whom a court of equity

> as a court of conscience will not even listen, because the conduct of such suitors is itself unconscionable—*i. e.*, morally reprehensible as to known facts.'
>
> *Associated Press* v. *International News Service*, (D. C.) 240 Fed. 983, is to like effect."

In the case of *Associated Press* v. *International News Service*, 240 Fed. 983, 989 (affirmed in 245 Fed. 244, 248 U. S. 215), cited with approval in the Hedman case, the Court said:

> "Now the doctrine that he who comes into equity must come in with clean hands does not recognize mere imputations of guilt based upon technical theories of agency. To invoke it a knowledge must exist on the part of the principal of the facts upon which the charge of unconscionable conduct is based, and in the case of a corporation, those facts must be brought home to the persons exercising general control over its affairs.
>
> No such knowledge has been shown on the part of the officers or manager of the Associated Press, and the complainant consequently is not barred from seeking the relief * * *."

After the Manton scandal, the C. C. A. (2d) granted a Petition for Review of *Art Metal Works* v. *Abraham & Straus*, 70 F. 2d 641, in which Judge Manton had delivered the majority opinion reversing the Decree. The C. C. A. (2d) then affirmed the Decree on the dissenting opinion of HAND, J. [107 F. 2d 944], wherein he had said:

> "My brothers believe, since the plaintiffs were liable for their salesmen's torts, that their declarations, made within the scope of their authority, charged their employer's conscience and barred this suit. I do not; and that is really the only importance of our decision beyond the interests of the immediate parties. Whenever the question has come up, it has been held that immoral conduct, to be relevant,

must touch and taint the plaintiff personally; that the acts of his agents, though imputed to him legally, do not impugn his conscience vicariously. *Vulcan Detinning Co.* v. *American Can Co.*, 72 N. J. Eq. 387, 391, 392, 67 Atl. 339, 12 L. R. A. (N. S.) 102; *Hedman Mfg. Co.* v. *Todd Protectograph Co.*, 265 Fed. 273, 278 (C. C. A. 7); *Associated Press* v. *International News Service*, (D. C.) 240 Fed. 983, 989. Cf. *Joseph Schlitz* v. *Houston Ice & Brewing Co.*, 241 Fed. 817, 824 (C. C. A. 5). * * * It would be monstrous that a man's conscience should bear the sins of those he employs, however liable he may be for their acts, and a doctrine which stands upon moral wrongdoing must clear itself of that confusion, or adopt another form. While it stands upon the court's repugnance to the suitor personally, it must confine itself to his personal deliquencies."

The District Court recognized this rule (in fact there are no cases to the contrary), but seemed to think that there was a distinction between imputed knowledge and implied knowledge, overlooking the fact that so far as the principal here involved is concerned, both kinds of knowledge are identical. They both negative the existence of personal knowledge. The one arises out of a technical rule of agency, and the other out of a technical rule of notice. Sec. 592, 2 Pomeroy's Eq. Jur. (5th Ed.).

In neither case is the conscience of the principal tainted, and in neither case has the principal been guilty of unconscionable conduct, that is, conduct "morally reprehensible as to known facts." *Hedman Mfg. Co.* v. *Todd Protectograph Co., supra.* Not a single case is found where a principal's "implied" knowledge—there being no actual, willful, intentional, personal knowledge—has ever been made the basis of denying equitable rights to a principal on the ground of "unclean hands."

III.

The C. C. A. held that the Insurance Companies had unclean hands because of misconduct of Street which had no relationship to the equity of the Insurance Companies involved in the merits of their original suits—which holding is in conflict with the decision of this court in Keystone Driller Co. v. General Excavator Co., 290 U. S. 240, 245, with the decisions of other Circuit Courts of Appeals on the same matter in Primeau v. Granfield, 193 Fed. 911, 916 (C. C. A. 2nd); Goodyear Tire & Rubber Co. v. Overman Cushion Tire Co., 95 F. 2d 978, 982 (C. C. A. 6th); Knapp v. S. Jarvis Adams Co., 135 Fed. 1008, 1010 (C. C. A. 6th); Bentley v. Tibbals, 223 Fed. 247, 252 (C. C. A. 2nd), and with the decisions of the Supreme Court of Missouri in Krug v. Bremer, 316 Mo. 891, 292 S. W. 702, and Stegmann v. Weeke, 279 Mo. 131, 214 S. W. 134.

The equity which the Petitioners sought in these cases was to have the ownership of the funds in the possession of the Court determined by an adjudication on the merits of the original suits of the reasonableness of the 16 2/3% increase, and the confiscatory character of the prior rates. The fraud committed by C. R. Street in connection with the settlement (which settlement the Insurance Companies had repudiated upon the discovery of the fraud) had no relationship to this equity, either immediate or remote. The petitioners required no aid from Street's fraud to establish that equity. That fraud in no wise affected the equitable relations between the parties to the action. Having repudiated the fraud and restored the entire amount which had been received by or for them to the possession of the court, it cannot be said that petitioners had gained any advantage from the settlement, and the rights of the parties would necessarily have to be determined upon the issues framed by the pleadings,

the bills and answers in the original suits, without any regard to the settlement, or the fraud that procured the settlement.

In *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240, 245, this Court said:

> "But courts of equity do not make the quality of suitors the test. They apply the maxim requiring clean hands only where some unconscionable act of one coming for relief *has immediate and necessary relation to the equity that he seeks in respect of the matter in litigation.* They do not close their doors because of plaintiff's misconduct, whatever its character, that has no relation to anything involved in the suit, but only for *such violations of conscience as in some measure affect the equitable relations between the parties* in respect of something brought before the Court for adjudication. Story, Eq. Jur., §100, Pomeroy, Eq. Jur., §399. They apply the maxim not by way of punishment for extraneous transgressions, but upon the considerations that make for the advancement of right and justice" (Emphasis supplied).

In *Primeau* v. *Granfield*, 193 Fed. 911, the Circuit Court of Appeals of the 2nd Circuit, page 916 of its opinion, said:

> "The wrong doing which will defeat a litigation must have connection with the matter in litigation. Misconduct in outside matters will not have such effect. A new contract upon a new consideration is not necessarily unlawful because it relates to property acquired through unlawful transactions. The real test in such a case as this is whether the plaintiff requires any aid from the fraudulent transaction to establish his demand. If he does he cannot recover. If he does not, and the cause of action is unconnected with the fraudulent undertaking and is founded upon a collateral consideration he may recover."

In *Bentley* v. *Tibbals*, 223 Fed. 247, 252, the Circuit Court of Appeals of the 2nd Circuit said:

> "We do not, however, think the maxim invoked is applicable to the case before the court. The maxim does not apply to every unconscientious act or inequitable conduct of the plaintiff. It is limited to misconduct connected with the matter in litigation, and does not apply to misconduct which is unconnected with the matter in litigation. 1 Pomeroy's Eq. Jur., §399. It is true that complainant violated the law of the United States in importing the phrase code into this country and selling it here. But, as was pointed out in *Kinner* v. *Lake Shore, etc., R. Co.*, 69 Ohio St. 339, 344, 69 N. E. 614, 615 (1903):
>
> > 'A court of equity is not an avenger of wrongs committed at large by those who resort to it for relief.'
>
> It is not sufficient to debar a suitor for relief that he has committed an unlawful act, unless that unlawful act affects the matter in litigation."

The decision of the C. C. A. is also in conflict with the decisions of the Supreme Court of Missouri.

In *Krug* v. *Bremer*, 316 Mo. 892, 899, 292 S. W. 702, 705, the situation was this: The plaintiff in the suit, an elderly widow, requested the Trustee in a mortgage to sell under foreclosure a farm which had been owned by her deceased husband so that she could buy it in and cut out the interests therein of some of her children. The suit was in equity to set aside the Trustee's sale and foreclosure upon the ground of unfairness in the sale. It was contended that her hands were unclean. The Supreme Court of Missouri said:

> "We do not think that the maxim 'unclean hands' is applicable to the facts here developed. It must relate to the particular matter involved. The

question here involved is the cancelling of the Trustee's deed, and the setting aside of the foreclosure sale for fairness on the part of the Trustee. The assertion that plaintiff's hands are unclean is enveloped in the right of protection for declining years and providing against want if possible on her part. The situations are not analogous. On the one hand she questions the Trustee's unfairness, while on the other her right to protect herself and provide against want or charity is questioned. *The question of unclean hands does not arise out of the transaction which is the subject of the suit"* (Emphasis supplied).

Quoting from *Stegmann* v. *Weeke*, 279 Mo. 131, 138, 214 S. W. 134, 136, the Court said:

"The ancient maxim that he who comes into equity must come with clean hands has been applied to various kinds of cases but it has its limitations. The particular inequity which prevents the pursuit of an equitable remedy on the part of the plaintiff must relate to the particular matter in hand, must arise out of the transaction which is the subject of the suit."

The correct principle is announced in *Chute* v. *Wisconsin Chemical Co.*, 185 Fed. 115, 118, where the Court said:

"* * * No cause of action will be proceeded with which has become infected with fraud or other inequity. It matters not when, or how, the facts are brought to the attention of the court. The distinction is, however, fundamental that the transgression which falls within this maxim must have infected the cause of action, so that to entertain it would be violative of conscience. *It does not reach a case where the cause of action is meritorious and where subsequent to suit brought the complainant has been guilty of reprehensible conduct, but which does not go to the cause of action"* (Emphasis supplied).

Wherefore, petitioners severally respectfully pray that writs of certiorari issue.

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Company, Globe and Rutgers Fire Insurance Company, Granite State Fire Insurance Company, Great American Insurance Company, Guaranty Fire Insurance Company of Providence, The Hanover Fire Insurance Company, Hartford Fire Insurance Company, The Home Insurance Company, Home Fire and Marine Insurance Company, Hudson Insurance Company, Imperial Assurance Company, Importers and Exporters Insurance Company, Insurance Company of North America, Insurance Company of the State of Pennsylvania, The Law Union and Rock Insurance Company, Ltd., Liverpool and London and Globe Insurance Company, The London Assurance Corporation, London and Lancashire Insurance Company, Ltd., London and Provincial Marine and General Ins. Co., Ltd., London and Scottish Assurance Corporation, Ltd., Lumbermen's Insurance Company, Manhattan Fire and Marine Insurance Company, Massachusetts Fire and Marine Insurance Company, Mechanics Insurance Company of Philadelphia, Merchants Insurance Company, Merchants Fire Assurance Corporation of New York, Merchants Fire Insurance Company, Mercury Insurance Company, Michigan Fire and Marine Insurance Company, Milwaukee Mechanics Insurance Company, Minneapolis Fire and Marine Insurance Company, National Ben Franklin Fire Insurance Company, National Fire Insurance Company of Hartford, National Liberty Insurance Company of America, National Reserve Insurance Company, National Security Fire Insurance Company, National Union Fire Insurance Company, The Newark Fire Insurance Company, New England Fire Insurance Company, New Hampshire Fire Insurance Company, New Jersey Insurance Company, New York Underwriters Insurance Company, Niagara Fire Insurance Company, The Northern Assurance Company, Ltd., Northern Insurance Company, North River Insurance Company, Northwestern Fire and Marine Insurance Company, Norwich Union Fire Insurance Society, Ltd., Old Colony Insurance Company, Orient Insurance Company, Pacific Fire Insurance Company, Palatine Insurance Company, Ltd., Patriotic Insurance Company of America, Philadelphia Fire and Marine Insurance Company, Phoenix Assurance Company, Ltd., The Phoenix Insurance Company, Presidential Fire and Marine Insurance Company, Providence Washington Insurance Company, Provident Fire Insurance Company, Queen Insurance Company of America, Reliance Insurance Company of Philadelphia, Rhode Island Insur-

ance Company, Royal Exchange Assurance, Royal Insurance Company, Ltd., Safeguard Insurance Company, St. Paul Fire and Marine Insurance Company, Scottish Union and National Insurance Company, Security Insurance Company of New Haven, Sentinel Fire Insurance Company, Springfield Fire and Marine Insurance Company, Standard Fire Insurance Company of Connecticut, Standard Fire Insurance Company of New Jersey, Star Insurance Company of America, The State Assurance Company, Ltd., Stuyvesant Insurance Company, Sun Insurance Office, Ltd., Superior Fire Insurance Company, Svea Fire and Life Insurance Company, Tokio Marine and Fire Insurance Company, Ltd., Transcontinental Insurance Company, The Travelers Fire Insurance Co., Twin City Fire Insurance Company, Union Assurance Society, Ltd., Union Fire Insurance Company, United Firemen's Insurance Company of Philadelphia, United States Fire Insurance Co., United States Merchants and Shippers Insurance Company, Victory Insurance Company, Westchester Fire Insurance Company, Western Assurance Company, Western Fire Insurance Company, The World Fire and Marine Insurance Company, Yorkshire Insurance Company, Ltd., Mechanics and Traders Insurance Company, Potomac Insurance Company of the District of Columbia,

Petitioners.

NOV 20 1942
CHARLES ELMORE CROPLEY
CLERK

31

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942.

No. 476.

AMERICAN INSURANCE COMPANY, ET AL., PETITIONERS,

vs.

EDWARD L. SCHEUFLER (SUCCESSOR), SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, ET AL., RESPONDENTS.

OPPOSING BRIEF OF RESPONDENT EDWARD L. SCHEUFLER (SUCCESSOR) SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942.

No. 476.

AMERICAN INSURANCE COMPANY, ET AL., PETITIONERS,

vs.

EDWARD L. SCHEUFLER (SUCCESSOR), SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, ET AL., RESPONDENTS.

OPPOSING BRIEF OF RESPONDENT EDWARD L. SCHEUFLER (SUCCESSOR) SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI.

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

INTRODUCTION.

The respondent, Edward L. Scheufler, Superintendent of the Insurance Department of the State of Missouri, opposes the grant of the writ of certiorari and respectfully urges the Court to deny the petition therefor.

The three-Judge District Court on August 14, 1940, rendered the decrees involved. These petitioners appealed to both this Court and to the Circuit Court of Appeals for the Eighth Circuit.

This Court held that a direct appeal would not lie to this Court. *American Insurance Co. vs. Lucas 314* U. S. *575, 62* Sup. Ct. *107*; 86 Law Ed. 55, Justices Murphy and Jackson not participating.

The Eighth Circuit Court of Appeals on July 25, 1942, affirmed the decrees of three-Judge District Court (*American Insurance Co. vs. Scheufler* 129 Fed. (2) 143, Rec. V, p. 16) and the petitioners are seeking a writ of certiorari to review that decision.

After the appeals had been taken Hon. Edward L. Scheufler succeeded Hon. Ray B. Lucas as Superintendent of the Insurance Department of Missouri and was duly substituted in these cases for Lucas by the Court of Appeals. (V pp. 7 and 8). Ray B. Lucas in January 1939 became Superintendent succeeding the late Geo. A. S. Robertson who in October 1937 had been appointed to said office as successor of R. Emmet O'Malley therein, who was successor of Joseph B. Thompson, successor of Ben C. Hyde.

Deeming the petitioners' statement to be inaccurate and not to be complete enough to cover even the meager facts set forth in the opinion sought to be reviewed or sufficient to give the court all the facts necessary to a decision upon this petition, we next submit our statement.

STATEMENT.

(1) The "prior rates" known as the "Hyde rates" mentioned in the third paragraph, page 3, of this petition, and claimed to have been *confiscatory*, came about by a rate *reduction* order made by Insurance Superintendent Hyde, on October 9, 1922. This reduction order was sustained in the Missouri Supreme Court in 1926 (*Aetna vs. Hyde*, 315 Mo. 113, 285 S. W. 65). After grant of certiorari this Court, on January 3, 1928, affirmed the decision of the Missouri Supreme Court (*Aetna vs. Hyde*, 275 U. S. 440) (Rec. Vol. A-8). Later attacks of the companies in the national courts on this 10% reduction ended adversely. *Aetna vs. Hyde*, 34 Fed. (2d) 185 rendered April 13, 1929; which was affirmed in *National Fire Insurance Company vs. Thompson*, 281 U. S. 331, on April 14, 1930. (Rec. Vol. A, 9-10).

(2) Thereupon the petitioners herein and other stock fire insurance companies then undertook to more than neutralize the above reduction, and to that end, on December 30, 1929, filed rating schedules to produce an increase of 16-2/3% in fire and windstorm rates over the Hyde rates, or 105% over the rates prior to the Hyde 10% reduction. As a result, in May 1930 these suits resulted: (a) 139 companies (the petitioners herein) brought in the United States District Court, the 137 suits mentioned in par. 3, p. 3 of the petition herein, out of which there arose the impounded funds herein involved and (b) about 60 companies joined in a single companion suit in the State Court to review the Superintendent's refusal to approve the proposed rate increase and out of which an impounded fund therein arose. All these suits were to enjoin the Superintendent of Insurance and the Attorney General from interfering with their purpose to collect this 16-2/3% increase. The companies lost this companion suit in the State Court, the O'Malley settlement hereinafter mentioned was rejected by the Missouri Supreme Court and the State Court impoundment of this 16-2/3% rate increase was ordered to be returned to policyholders. *American Constitution Fire Assur. Co. v. O'Malley*, 342 Mo. 138; 113 S. W. (2d) 795.

(3) Respecting the 137 suits brought in the U. S. District Court, we adopt and quote from par. 3, p. 3 the Petitioners' statement: "In May, 1930, the petitioners filed separate suits to enjoin the Superintendent of Insurance and Attorney General of Missouri from interfering with the petitioners' collection of a 16-2/3% increase in rates, on the ground that the prior rates were confiscatory; that the 16-2/3% increase was reasonable; and that the threatened acts of the Superintendent of Insurance and Attorney General, and the Missouri Statutes under which they claimed to act, were confiscatory, and unconstitutional under the 14th Amendment.

"On July 2, 1940, the 3-Judge Court enjoined any interference with the collection of the 16-2/3% increase, but upon condition that the 16-2/3% increased rates, when collected, should be impounded and paid to the Court's Custodian (R. 19-25, Vol. A); and about $10,000,000 was so 'impounded' in the Court's custody."

(4) On May 18, 1935, R. Emmet O'Malley, Superintendent of Insurance, and Charles R. Street, as agent of the insurance companies, entered into a contract of settlement of all the cases. (Copy: Rec. I, 27-31, summarized in Rec. IV, 66-67).

In this settlement agreement Superintendent O'Malley agreed to set aside his predecessor Thompson's order of May 28, 1930, expressly disapproving the 16-2/3% increase, and make a new order retrospective to June 1, 1930, approving four-fifths of the increase of fire and windstorm rates and disapproving to the extent of one-fifth of the rates proposed in those classes. (The power to make such a retroactive rate order was expressly denied by the Missouri Supreme Court in the *American Constitution* case, supra, Feb. 28, 1938, in the Companion State Court 16-2/3% case). The contract further agreed that the court may order that a return of 20% of the impounded funds should be returned to the policyholders, fifty per cent thereof to the insurance companies (these petitioners) and thirty per cent to "R. J. Folonie, counsel for plaintiff in said suits and Charles R. Street, Chairman of the Committee of the companies supervising such matters on behalf of the companies", as trustees to take care of certain expenses of the litigation, including $500,000.00 as fees and expenses of the attorneys for Superintendent O'Malley. (See Contract Vol. I, l. c. 29).

(5) Following this (June 19, 1935) a stipulation relating to settlement was filed (A 175-8) in the U. S. District Court, which among other things provided for said distribution and the termination of the suits (A l. c. 177).

At various times after the execution of the contract and of the filing of the motion for stipulation, the matters were presented to the three-Judge district court by counsel. On one occasion, October 26, 1935 (Rec. Vol. A, pp. 178-208) there appears the addresses to the court by attorneys on both sides urging the court to make the requested order to complete the settlement. These abound in assurances of its fairness and good faith.

(6) On February 1, 1936, the decrees of the three-Judge Court resulted in the order of a distribution of the impounded funds as had so been agreed upon. (Record Vol. I, 32-40),

summarized in Record Vol. IV, 67-74). The thirty per cent of said impounded fund was received by Charles R. Street and Robert J. Folonie as trustees, and they executed a declaration of trust, copies in Volume I, 40-44, and summarized in Volume IV, 75-88.

It will be observed that paragraph *No. 1* of the decree of February 1, 1936, (Rec. Vol. I, 33 and Vol. IV, 67) recited that the controversy having been settled and disposed of, the cause is dismissed, and in paragraph *No. 7* (Rec. I, l. c. 39 and Rec. IV, l. c. 73) jurisdiction was retained to make orders respecting the obligation of the parties or the fund, etc., and in paragraph *No. 8* the plaintiff and its sureties were by the Court discharged from liability upon the injunction bonds heretofore executed by the Court and entered into by the plaintiff and its sureties. (Rec. Vol. I, 39 and Vol. IV, 74).

(7) About April or May, 1939, it was learned that the settlement and decree had been brought about by the payment of large sums of money to T. J. Pendergast, a political boss in Missouri, and the bribery of O'Malley, the then Superintendent of Insurance of Missouri. Hon. Ray B. Lucas, then Insurance Superintendent of Missouri, filed his motion for citation on May 29, 1939 (Rec. Vol. A, 220-25) in each of the 137 cases and against each and all the companies (Rec. Vol. A, 230) who are petitioners herein. The companies then, were represented by the counsel who now appear for them herein. (Rec. Vol. A 229).

THUS, ON MAY 29, 1939, THERE WAS INSTITUTED THE PROCEEDINGS OUT OF WHICH THE DECREES OF AUGUST 14, 1940 (A 412) RESULTED, AND WHICH WERE THE SUBJECT OF THE DECISION ON APPEAL TO THE EIGHTH CIRCUIT COURT OF APPEALS NOW SOUGHT TO BE REVIEWED.

(8) Such *motions* for citation, among other things, alleged that while the rate cases were pending, at issue and undetermined in said Court, and involving the right of the complainant companies to a proposed 16-2/3% premium

rate *increase* for fire and windstorm insurance, (which the Superintendent (Thompson) had refused to approve), that Charles R. Street as agent for all the insurance companies, complainants (or plaintiffs) by means of the bribery of O'Malley (then Superintendent), and the corruption of T. J. Pendergast, had induced the said O'Malley to enter into a written contract with him, dated May 18, 1935, to settle all said 137 cases pending in said court and a companion state court case and to distribute the impoundings therein; that as a direct result of said agreement and of the motions and stipulations presented to the court, which had no knowledge of such bribery, a fraud "especially respecting the distribution of the fund" was practiced and perpetrated upon the district court which caused its decrees of February 1, 1936 (A 212-20) in all of said 137 cases to be made upon the basis and terms of said agreement; that said last mentioned decrees, following the terms of said agreement, had ordered that distribution of the impounded funds, which, from time to time since July 1, 1930, had been impounded with the court's custodian during the pendency of the litigation, (and to abide the events thereof), be made in the ratios of 20% to policyholders and 80% to the plaintiff companies in the litigation.

(9) Said Motions also alleged, among other things, that said decrees of February 1, 1936, dismissed the suits, released all complainants and their sureties from all liabilities on all the injunction bonds and retained jurisdiction over all persons or parties affected by the decrees (A 228).

The prayers of said Motions were for citations:

1. "That citation be issued and served upon the plaintiff and the plaintiffs in the said related cases ordering and directing them to show cause, if any they have, why said decrees of this Court made February 1, 1936, should not be set aside to the extent of the distribution thereof and that such decrees be so modified as to assure an ultimate distribution to policyholders of the entire fund unlawfully collected from them, giving credit for the sums paid them, and that they and each of them may be ordered and adjudged to pay to the custodian of this

Court the full 80 per cent of all the said impounded fund, together with interest of at least 6 per cent per annum since the funds were taken from such policyholders."

2. "For such other and further relief as may seem meet."

RESTORATION AND SHOW CAUSE ORDERS ISSUED.

(10) The District Court, at the hearing (A 229-249) on May 29, 1939, made two orders: (1) for restoration to the custodian on or before July 1, 1939, of all of said 80% which had been withdrawn (A 249-50) and (2) a Show Cause Order (A 251) requiring the companies, on or before June 15, 1939, to show cause, if any,

> "Why all the funds which have been ordered to be returned by it to the Custodian, Wm. T. Kemper, Jr., heretofore appointed in this cause under order of this Court on this date, as well as all other sums of money in the hands of said Custodian, should not be distributed to the proper policyholders and this cause dismissed at the cost of the plaintiff, including the cost of such distribution to such policyholders." (A 251).

Entire satisfaction was there expressed by counsel for the companies (A 245) as well as repeated assent to restoration of the funds earlier in such hearing (A 239), and especially when the court questioned counsel particularly on the procedure (A 240-44) and no objections were made and no exceptions were taken to either order (A 244-5). The companies fully restored the funds to the custodian as required by said order, without objection, challenge or any form of resistance through court actions or otherwise, amounting to $7,190,982.99. (Rec. IV, p. 120). In addition thereto the custodian had at that time $613,918.21 which had not been distributed to the companies (Rec. IV, p. 120) and also $327,322.31 accrued from interest and accretions, which had been withheld chiefly to carry the cost of distribution to policyholders. Therefore $8,132,223.51 is now involved, which does not include any part of the 20% set apart for policyholders.

ANSWERS TO SHOW CAUSE ORDER.

(11) We have so strenuously insisted that the companies' answers made no claim to this fund and did not ask a reinstatement of the rate cases, including injunctions, that we will quote from petitioners' petition (Last half p. 6) to support our view, to-wit:

"Each of the petitioners filed its return to this show cause order on June 15, 1939. In these returns, after denying that C. R. Street, or any other person, was authorized to commit bribery or to pay any moneys to induce official action, or to consent to so doing, and after denying knowledge of or participation in any supposed bribery, or payment of moneys to induce official action, and after a disaffirmance of any advantage in any wise arising from the decree of February 1, 1936, either upon the settlement or rate order forming the basis thereof, they alleged that the Court could 'make distribution of the sums in its possession only according to law to the lawful owners of said monies as may be determined upon an appropriate hearing and determination of the merits of the controversy as set forth in the pleadings of the respective parties and pursuant to the evidence and Master's Report and exceptions thereto'; and *prayed* that the Superintendent show cause 'why the Court should not proceed with the determination of the merits of the controversy between plaintiffs and defendant as in their pleadings set forth' (R. Vol. A, pp. 257, 258)."

MOTION TO STRIKE.

(12) On June 19, 1939, Superintendent Lucas filed his motion to strike out all of said answers (Rec. A, 263-70) which motion might well have been sustained for the reason that the facts alleged therein stated no lawful answer to the show cause order or any defense thereto nor any reason why the show cause order should not be made absolute and made no claim to the fund apart from a suggested retrial of their abandoned rate cases and a request for citation against the Superintendent which was purely a procedural contention.

But, instead, the Court appointed a special master to take the testimony as to the conduct of the parties in these

cases and as to any connection therewith of any agent of the companies authorized to act in connection with this litigation and as to the knowledge of any authoritative officer or officers of the companies as to the acts of any such agent. (A 270). The master took the testimony (Rec. Vols. I, II and III) wherein the companies by their aforesaid attorneys appeared at each hearing and without objection of any kind participated and cross-examined adverse witnesses as well as producing (III, pp. 437 to 534) their own testimony, which showed no right or claim to the fund. The Master's report Vol. IV was filed with said Vols. I, II and III on January 25, 1940.

(13) Thereupon the cases were briefed, and on May 20, 1940, argued before the three-Judge District Court, (A 273-349), by the same counsel for the companies and the Superintendent as appeared when the orders of restitution and to show cause were entered. No formal pleading or motion was filed claiming the fund. After a full consideration of the case the Court entered its findings of fact (A 407-10), its conclusion of law (A 410-11) and its decree appealed from. (A 412-13). The opinion of the three-Judge District Court on the merits will be found *American Insurance Company vs. Lucas*, 38 F. Supp. 896, and on the motion for new trial, same case, 38 F. Supp. 926. Both opinions were by Judge Kimbrough Stone, Circuit Judge. Reeves and Otis, District Judges, concurred in both.

(14) Charles R. Street was the agent of all the companies involved (Finding of Facts VIII, Rec. A, p. 409), the petitioners herein. He paid T. J. Pendergast $50,000.00 and agreed to pay $750,000.00 to procure the settlement (Finding of Facts I, Rec. A, 407). O'Malley entered into the agreement of settlement to dispose of the impounded fund with full knowledge of said payment (Finding II A, l. c. 407). Street made further payments to Pendergast from which he paid O'Malley $62,500.00, $22,500.00 of which was before the motion and stipulation for settlement were filed in the District Court upon whch the decree of dismissal and distribution of the impounded funds were based (Finding No. III, Rec. A, l. c. 408) to effectuate the distribution of the funds (20% to the policyholders and 80% to the companies

that is 50% direct and 30% to trustees for expenses with remaining balance to the companies, (Finding IV, Rec. A, l. c. 408) action by the court was necessary and upon representations (also the motions and stipulation for settlement) that it was an honest good faith settlement by antagonistic litigants the decree of February 1, 1936 was entered (Finding V, Rec. A, pp. l. c. 408). A total of $440,000.00 of companies' moneys were paid by Street to Pendergast.

(15) When the appeals were taken from the District Court to the Eighth Circuit Court of Appeals, the petitioners filed their points to be relied upon, fifteen in number, none of which complained of the findings of fact or conclusions of law, either generally or specifically, and which will be found A 490-494. It will be observed that all except points 14 and 15 charged that "The Court erred in *holding*" (Italics ours), which refers only to the *ruling* of the Court on the law, or if it means the Court's fact findings, it means only the facts which the Court mentioned and found in its opinions.

(16) In carrying the appeal to the Eighth Circuit Court of Appeals, the appellants stated in their *Brief* their points to be relied upon for reversal (Rec. V, pp. 8-11), being eleven in number, none of which challenge or complain of the findings of fact or conclusions of law. In the first ten of the points set out the petitioners again allege only error of the Court in *holding*. (See Rec. Vol. V, 11).

The 11th point alleges error in refusing to grant each of the companies the right to a decision on the merits and in denying interlocutory injunctions and permanent injunctions as prayed in the original and Amended Bills of Complaint.

There was no citation in that connection of any place in the record where the right to a decision on the merits was asked unless it be in the Answer to the show cause order and no citation of any place in the record (for there was none) where injunctions were asked or denied. In the petition filed herein for writ of certiorari it is not even asserted that injunctions were asked or denied.

(17) The unanimous opinion in the Eighth Circuit Court affirmed the judgment of the three-Judge District Court. *American Insurance Company vs. Scheufler* et al., 129 F. (2d) 143 (V. 16-25). The Court of Appeals, in its said opinion, stated the fact to be (and it is true) that points 9, 10, and 11, relied upon for reversal, were not briefed, and, therefore, were *abandoned* (Opinion V 19). If the petitioners are now asking for a writ of certiorari upon any of these abandoned assignments, (Nos. 9, 10, and 11, set out in their brief) we submit that the petition should be denied, as it should also be denied on other grounds.

SUMMARY OF THE ARGUMENT.

I.

Petitioners' points relied upon for reversal in the C. C. A. were so insufficient and defective that they presented nothing for review in that Court. Therefore, they are in no position to urge any reasons in this Court as grounds for allowance of the writs of certiorari.

(1) Petitioners are in no position to urge consideration of any of "Questions Presented" (R. Vol. V, pp. 8-9) or of any of their "Reasons relied upon for the allowance of the writ" (R. Vol. IV, pp. 10-25) in their petition, for the reason that in order for same to be considered in this Court, such questions or reasons must have been properly assigned and presented as errors in the C. C. A. That is, they must be based upon errors properly assigned and presented in the C. C. A., which has not been done herein. Petitioners in their brief relied upon eleven points for reversal in the C. C. A. The first ten of said points merely charged that the District Court erred in holding, etc. Point eleven was nothing more than an assignment that the decree was for the wrong party. None of these points directly attacked the findings of fact of the District Court and they did not make any specific reference to the District Court's conclusion of law. Neither did they give any reference to the page of the record where any finding of fact, conclusion of law, or other ruling or action of the District Court complained of was to be found. The first ten points

in merely charging that the Court erred in holding, etc., were directed to the holding of the District Court, as reflected in its opinions on the merits and in denying the motions for new trials. Point eleven was insufficient because it did not particularize any error. Points charging error must be so definite that the Court will understand from them what errors are before the Court for review.

(2) Petitioners are in no position herein to urge Question I of the "Questions Presented" page 8 of their petition, and Reason I of "Reasons relied upon for the allowance of the writ," page 10 of their petition, as ground for granting certiorari. Such question and reason are based upon points 10 and 11 of the "Points relied upon for reversal" by petitioners in the C. C. A. and these points were abandoned in the C. C. A. because petitioners neither briefed nor argued said points in the C. C. A. Having abandoned said points 10 and 11 in the C. C. A., petitioners may not urge any reason or ground herein for allowance of the writ based on said points 10 and 11.

(3) Question II of the "Questions Presented" on page 10 of the petition for certiorari may not be urged herein as ground for certiorari for the reasons (1) This question is neither briefed nor argued herein and is, therefore, abandoned, and (2) Said question was not assigned as error in the C. C. A., and was not raised by the pleadings or otherwise in the Courts below. Such question being raised for the first time in this Court will not be considered.

II.

Petitioners' contentions in their reason I of their "Reasons for allowance of the writ," page 10 of their petition, that the C. C. A. held the $8,000,000.00 should be paid to the policyholders without any decision (1) as to who owned the funds, or (2) whether or not the prior rates were confiscatory, and the increased rates lawful, and that the holding of the Court is in conflict with United States vs. Morgan, 307 U. S. 183, are without merit because:

(1) They did not ask or demand such relief including injunction in their pleadings as required by Rule 8, Federal Rules of Civil Procedure, Title 28, U. S. C. A. foll., Section 723c. Not having asked or demanded this relief by their

pleadings, they cannot now complain. The case was fairly tried on the issues as framed by the pleadings.

(2) The Court was without power in the show cause proceeding to determine whether or not the prior rates were confiscatory and the increased rates lawful. That could only be done in the original statutory injunction proceeding, which had been voluntarily dismissed by petitioners, and was not asked to be reinstated including injunction in the show cause proceeding.

(3) The prior rates were sustained by the Missouri Supreme Court, *Aetna vs. Hyde*, 315 Mo. 113, 285 S. W. 65, which decision was affirmed by this Court, *Aetna vs. Hyde*, 275 U. S. 440; subsequent attacks on the prior rates failed in the Eighth Circuit, *Aetna vs. Hyde*, 34 F. (2d) 185, affirmed by this Court, *National Fire Insurance Company vs. Thompson*, 281 U. S. 331. In a companion State Court case, where the increase was impounded as was done herein, the Missouri Supreme Court held that the impounded funds belonged to the policyholders, *American Constitution Fire Assurance Company vs. O'Malley*, 342 Mo. 139, 113 S. W. (2d) 795.

(4) The petitioners, by their bribery of the Superintendent and their fraud upon the Court, forfeited their right to have the original injunction suits reinstated. The issues, as framed by the pleadings, were found against petitioners by both the District Court and the C. C. A. upon abundant evidence.

(5) The case at bar being a proceeding in equity, the Court, by the motion to show cause, was called upon to act upon its earlier action in the original matter in equity. In such situations the name and form of the action is immaterial, provided it affords adequate opportunity for interested parties to support and contest the relief sought. This opportunity includes the necessary elements as due process, such as sufficient notice, production of evidence and proper hearing in other respects. Where these essentials have been preserved, procedure by motion has been approved. These were all afforded petitioners herein.

(6) When the fraud was called to the attention of the Court, it was then the duty of the Court to do all within its

power to prevent the wrongdoers from enjoying any advantage of their own wrong.

(7) It was only necessary in the show cause proceeding, it being in equity, upon discovery of the fraud, to operate upon the wrongdoers benefiting by the fraudulent decree and need not disturb the original decree or judgment.

(8) There is no conflict between the holding in this case and United States vs. Morgan, 307 U. S. 183. The Morgan case was a *pending controversy*. There had been no voluntary dismissal of the cause upon agreement of adverse parties at a previous term, as in this case. There was no bribery of one of the adverse litigants and no fraud imposed on the Court as in this case.

III.

There is no conflict between the holding of the C. C. A. in this case and the decisions of other Circuit Courts of Appeal. In all the cases cited by petitioners from other Circuits which they claim to be in conflict with the holding of the C. C. A. in this case, only mere salesmen and underlings were the agents involved. They did not represent the corporations in the sense that their acts were the corporations' acts. They were not such agents as their knowledge was the knowledge of the corporation. In this case Street was an authorized unrestricted agent for all the companies. He was authorized to so act by the managing officers of the companies involved. It was the managing officers of the petitioners who had knowledge of Street's conduct and who authorized all money to be paid to Street under the very unusual and suspicious circumstances as found by the District Court. These were officers whose knowledge was the knowledge of the corporation.

IV.

The managing officers of petitioners had knowledge of facts which should have put them on inquiry. The knowledge of these officers was the knowledge of the corporations. The means of knowledge were at hand for them to have obtained full knowledge of the fraud, if they desired

to inquire. They are chargeable with all the facts which a proper inquiry would have disclosed. It follows that the companies were also chargeable with such knowledge.

V.

The bribery of the Superintendent and the fraud imposed upon the Court by petitioners in the original rate suits were accomplished while these suits were pending and at issue. The wrong-doing directly related to the matter in controversy and affected petitioners' equity therein. They may not now have this same controversy in which they imposed the fraud upon the Court, reinstated and tried, and a request therefor (which they did not ask below) is not ground for granting certiorari herein. They are precluded from doing so by the unclean hands maxim, which requires that a litigant keep his hands clean throughout the litigation.

ARGUMENT.

I.

PETITIONERS' POINTS "RELIED UPON FOR REVERSAL IN THE C. C. A. PRESENTED NOTHING FOR REVIEW IN THAT COURT. THEREFORE, THEY MAY NOT URGE ANY REASONS HEREIN AS GROUNDS FOR CERTIORARI.

(1) Petitioners are in no position to urge consideration of any of "questions presented" (R. Vol. V, pp. 8-9) or of any of their "reasons relied upon for the allowance of the writ" (R. Vol. IV, pp. 10-25) in their petition, for the reason that in order for same to be considered in this Court, such questions or reasons must have been properly assigned and presented as errors in the C. C. A. That is, they must be based upon errors properly assigned and presented in the C. C. A., which has not been done herein. All of the points relied upon for reversal in the C. C. A. did not directly attack the findings of fact of the District Court and they did not make any specific

reference to the District Court's conclusions of law. Neither did they give any reference to the page of the record where any finding of fact, conclusion of law, or other ruling or action of the District Court complained of was to be found. Rule 14, Sec. 2, Fourth Par., Eighth Circuit.

Petitioners in their brief relied upon eleven points for reversal in the C. C. A. The first ten of these points charged that the "Court erred in holding". (See points relied upon for reversal in C. C. A., R. Vol. V, pp. 8-11). These ten points were directed to the holding of the District Court as reflected in its opinions on the merits and in denying the motions for new trial. The findings of the Court were not directly challenged by the first ten points, and therefore presented nothing for review before the C. C. A. as held by the C. C. A. (See Opinion C. C. A., Vol. V, pp. 19-23).

Jones vs. Futrall, 75 F. (2d) 418 (C. C. A. 8);
E. R. Squibb & Sons vs. Mallinckrodt Chemical Works, 69 F. (2d) 685; certiorari denied, 295 U. S. 759, and certification of rule question to this Court in same case, 293 U. S. 190, quoted from in Point I-(2) supra, of this argument.

Ford Motor Company vs. Brady, 73 F. (2d) 248 (C. C. A. 8);
United States vs. Porter Fuel Co., 247 F. 769, 770, (C. C. A. 8);
Stone vs. United States, 164 U. S. 380, 383;
United States vs. Shoshone Tribe of Indians, 304 U. S. 111, 115;
M. E. Blatt Co. vs. United States, 305 U. S. 267, 277.

In Jones vs. Futrall, supra, the Court said: (l. c. 419)

"The other specifications, with the exception of the last specification, challenge 'holdings' of the Court. These obviously refer to the reasons which are given in the opinions for the conclusion reached.

In the case of E. R. Squibb and Sons. vs. Mallinckrodt Chemical Works (C. C. A. 8) 69 F. (2d) 685, 686,

this Court said, with reference to such assignments: 'Obviously, each of these assignments is an attack upon a rule of law claimed to have been stated in the opinion. It is a long established doctrine in this Court that error cannot be based upon the opinion of the Trial Court (citing cases).' "

The Court then quoted from United States vs. Porter Fuel Co., supra: (l. c. 420)

" 'The opinion of the Court was not the subject of exception or assignment of error. The reasons given in the opinion for the judgment of the Court might be wrong, and still its judgment right. It is what the Court did, and not what it said, which is subject to exception and review.' "

Of like effect:

Ford Motor Company vs. Brady, supra.

See also holding of this Court on certification of question to this Court by C. C. A. 8 as to whether that Court could affirm judgment where assignment of errors were so defective as to present nothing for review in the case of E. R. Squibb and Sons vs. Mallinckrodt Chemical Works, supra, 293 U. S. 190, discussed and quoted from under point I-(2) of this argument.

The holding of the Eighth Circuit Court of Appeals on this question is in line and conformity with the holding of this Court.

In *Stone vs. United States*, supra, this Court said: (l. c. 383)

"We are not at liberty to refer to the opinion for the purpose of eking out, controlling or modifying the scope of the findings."

Of like import are:

United States vs. Shoshone Tribe of Indians, 304 U. S. 111, 115;
M. E. Blatt Co. vs. United States, 305 U. S. 267, 277.

There can be no ground in this Court for the urging of any reason for allowance of the writ arising out of Point 11 of the points relied upon for reversal in the C. C. A. for the reasons (1) Point 11 was abandoned in the C. C. A. and no reason based thereon can be urged here for allowance of the writ. (See authorities under point I-(2) of this argument.) (2) Point 11 of the points relied upon for reversal was nothing more than an assignment that the decrees were for the wrong parties, which is not sufficient to require a review for the reason it does not particularize any error.

Sea Board Air Line Ry. vs, Watson, 287 U. S. 86;
Wade vs. Blieden, 86 F. (2d) 75, (C. C. A. 8).

Points charging error must be so definite that the Court will understand from them what errors are before the Court for review. Resort cannot be had to the brief of a party to enlarge them or make them more particular.

Currin vs. Nourse, 74 F. (2d) 273, (C. C. A. 8);
American Surety Co. vs. Fisher Warehouse Co., 88 F. (2d) 536, (C. C. A. 8).

Where no claim is made in points to be relied upon that the testimony is insufficient to support the decree, it is unnecessary for the Court to discuss whether it is sufficient or not. The C. C. A. and this Court are not Courts of original research.

King vs. Worthington, 104 U. S. 44;
Ward and Rand vs. Boston Coffee Company, 41 F. (2d) 625, (C. C. A. 8).

It seems clear that all of the eleven points relied upon for reversal by petitioners in the C. C. A. were so defective and insufficient that they presented nothing to that Court for review, and as that Court held, the failure of petitioners in that Court in that respect was sufficient ground for affirmance of the judgment. In the C. C. A. none of said points challenged the findings of the District Court. They made no specific reference to any conclusions of law of the District Court and they did not give any reference to the

page of the record where any finding of fact, conclusion of law, or other ruling or action of the District Court complained of could be found. Therefore, all points relied upon for reversal in the C. C. A. were so defective as to present nothing for review by that Court, and no questions or reasons can be urged here for allowance of the writ based upon the said points purporting to assign error in the C. C. A.

(2) Petitioners are in no position to urge this Court to pass upon Question "I" of "Questions Presented", page 8 of their petition, and Reason "I" of "Reasons relied upon for the allowance of the writ," page 10 of their petition, as grounds for granting certiorari. This is so because the reason set forth in Reason "I" for the allowance of the writ was incorporated in and based upon Points 10 and 11 of the Points relied upon for reversal in the C. C. A. (Rec. V, p. 10). The petitioners did not brief or argue Points 10 and 11 of their points relied upon for reversal in the C. C. A. The C. C. A. held that by that failure petitioners had abandoned said points. (Rec. Vol. V, p. 19). The holding of the C. C. A. is in accord with the holding of this Court and the overwhelming weight of authority.

E. R. Squibbs & Sons vs. Mallinckrodt Chemical Works, 293 U. S. 190;

E. R. Squibb & Sons vs. Mallinckrodt Chemical Works, 69 F. (2d) 685 (C. C. A. 8), certiorari denied, 295 U. S. 759;

Eastman Kodak Company of New York vs. Southern Photo Materials Company, 273 U. S. 359;

I. T. S. Rubber Co. vs. Essex Rubber Co., 272 U. S. 429.

In the Squibb case, 69 F. (2d) 685, the Circuit Court of Appeals, Eighth Circuit, held, l. c. 687, that an assignment of error was abandoned where question presented thereby was not argued in appellant's brief. This Court answered in the affirmative the following question certified to it by the C. C. A. in that case, 293 U. S. 190:

> "Where, on an appeal properly in this court, the appellee contends that one of the assignments of error has been abandoned and all others are not presentable

because defective either as assignments of errors or as specifications of errors and urges affirmance of the decree appealed from and this Court determines that such contention is well founded in all respects and that no issue on the merits is, for such reasons, presentable to it, is it proper to affirm the decree appealed from,"

. . . . . .

This Court subsequently denied certiorari on the C. C. A. decision, 69 Fed. (2) 685, in this same case, 295 U. S. 759.

Eastman Kodak Company of New York vs. Southern Photo Materials Company, 273 U. S. 359. This Court said: (l. c. 369)

"While many errors were assigned, some of which were also specified, in general terms, in the defendant's brief in this Court, we confine our consideration of the case in this opinion to the controlling questions which are stated in that brief to present the chief issues here in controversy, *and to which alone the argument in the brief is directed.*" (Italics ours.)

I. T. S. Rubber Company vs. Essex Rubber Company, 272 U. S. 429, this Court said: (l. c. 431-32)

"In the brief for the I. T. S. Company in this Court it is asserted, in general terms, that the action of the Essex Company 'in suits brought against its jobbers in the Sixth Circuit estop it from denying infringement here', and that the Circuit Court of Appeals erred in holding that it was not estopped by the decrees in such suits. *The argument in the brief, however, specifies and deals with only one of such prior suits; and there being as to the others no semblance of compliance with the requirements of Rule 25 of this Court, we need consider only the suit specifically relied on.*" (Italics ours.)

The petitioners having abandoned Points 10 and 11 of their points relied upon for reversal in the C. C. A. cannot now raise the same ground or reason here by Reason "I"

of their Reasons for allowance of the writ as ground for granting of the writ.

(3) Question II of the questions presented on page 10 of petitioners' petition for certiorari affords no basis for granting certiorari for the reasons (1) This question is neither briefed nor argued herein and under the holdings of this Court is abandoned, (See authorities under point I-(2), of this argument) and (2) The question as to whether the show cause orders (entered in each petitioner's case) automotically set aside the decrees of February 1, 1936, dismissing the cause, and thereby left the three-Judge Court absolutely free to determine the merits of the petitioners' original suits, to-wit, whether the impounded funds should be paid to policyholders or should be paid to petitioners, was not assigned or specified as error in the C. C. A. and was not raised by the pleadings or otherwise in either of the Courts below, and such question presented for the first time in this Court in support of a petition for certiorari will not be considered. (See points relied on for reversal in C. C. A.) (V 5, pp. 8-11).

Sonzinsky vs. United States, 300 U. S. 506, l. c. 514;
Burnett vs. Commonwealth Improvement Company, 287 U. S. 415, l. c. 418;
Edward Hines Yellow Pine Trustees vs. Martin, 268 U. S. 458, l. c. 465, and cases cited.

Furthermore, petitioners may not prevail in this Court upon a theory different from theory relied on in lower Court.

Delaware, Lackawana and Western Railroad Company vs. Koske, 279 U. S. 7, l. c. 10.

II.

PETITIONERS NOT ENTITLED TO RELIEF WHICH THEY DID NOT ASK IN LOWER COURT. THE FAIRNESS OF THE RATES COULD NOT BE LITIGATED IN THIS PROCEEDING, BUT THE PRIOR RATES HAVE BEEN SUSTAINED IN BOTH

FEDERAL AND STATE COURTS. COURT COULD ONLY DETERMINE ISSUES AS FRAMED BY PLEADINGS IN SHOW CAUSE PROCEEDING UPON WHICH PETITIONERS HAD FAIR TRIALS. SHOW CAUSE PROCEEDING WAS PROPER AND AFFORDED PETITIONERS DUE PROCESS. THERE IS NO CONFLICT BETWEEN THIS CASE AND UNITED STATES VS. MORGAN, 307, U. S. 183.

Petitioners attack in their Reason I for the allowance of the writ, at page 10 of the petition, what they claim to be the holding of the Court that the $8,000,000.00 should be paid to the policyholders, without any decision, (1) as to who owned the funds, or (2) whether or not the prior rates were confiscatory, and the increased rates lawful. They state several reasons why certiorari should be granted because of this claimed holding of the Court and that the Court's holding is in conflict with United States vs. Morgan, 307 U. S. 183. There is no merit in petitioners' contentions.

(1) Petitioners in their answers (last half page 6 petition) to the show cause order make no demand for the relief for which they now contend, as required by Rule 8, Federal Rules of Civil Procedure, Title 28, U. S. C. A. foll., Section 723c. That is, they did not in their answer demand (1) That the rate suits be reinstated and to include injunction, (2) The ownership of the funds be adjudged and decreed, and (3) That the Court adjudge and decree whether or not the prior rates were confiscatory, and the increased rates lawful. Not having demanded this relief by their pleadings, they cannot now complain. The issues as framed by the pleadings were tried on the merits thereof and the Court found against petitioners upon abundant evidence. Petitioners are having their day in Court in accordance with law and substantial justice.

(2) The Court in the show cause proceeding was without power to decide whether or not the prior rates were confiscatory. Such adjudication could only be made in the original statutory injunction proceeding, which was dismissed by the consent decree of February 1, 1936 and had not been reinstated. This Court inferentially held that

on the direct appeal of this case to this Court American Insurance Company vs. Lucas, not yet officially reported, 86 L. E. 55, 62 S. Ct. 107, wherein it was held that the decrees herein, "were not decrees granting or denying an injunction." Therefore direct appeals to this Court do not lie."

(3) The prior rates or the Hyde rates were sustained by the Missouri Supreme Court June 23, 1926. *Aetna vs. Hyde*, 315 Mo. 113, 285 S. W. 65, and this Court affirmed the decision of the Missouri Supreme Court, *Aetna vs. Hyde*, 275 U. S. 440, (Rec. Vol. A 8). Thereafter, the efforts to attack the Hyde rates or prior rates ended in an adverse decision to the insurance companies in the Eighth Circuit on April 13, 1939 (*Aetna vs. Hyde*, 34 Fed. (2d) 185) which was affirmed by this Court in National Fire Insurance Company vs. Thompson on April 14, 1940, 281 U. S. 331 (Rec. Vol. A, 9-10). A number of insurance companies brought a companion action in the State Courts to review the action of the Superintendent in disapproving the increase in rates. The increase was ordered collected and impounded by the lower State Court, as was done herein. On appeal to the Missouri Supreme Court, in this companion State Court rate suit, *American Constitution Fire Assurance Company vs. O'Malley*, 342 Mo. 139, 113 S. W. (2d) 795, that Court held, among other things, that the impounded funds as represented by the increased rates, belonged to the policyholders, because Superintendent O'Malley had no authority of law to approve a rate increase to operate retroactively, as was provided in the settlement agreement of May 18, 1935, which included these 137 suits as well as the companion state court suit. Such settlement agreement was the basis for the decrees of February 1, 1936 in these 137 cases in the District Court.

(4) The petitioners forfeited their right to have the original injunction proceedings reinstated (which they did not ask) by their bribery of the Superintendent of Insurance, and their fraud upon the Court in obtaining the decrees of February 1, 1936. They, by their bribery of the Superintendent of Insurance, and the fraud upon the Court, settled and disposed of the then pending rate controversy.

Their bribery and fraud related to the very matter in controversy and which controversy they are now seeking by their petition for certiorari herein to reinstate. These matters were issues and questions raised by the pleadings in the show cause proceedings and these issues and questions were found against the petitioners on abundant evidence by the District Court in its findings of fact (A 407-10) and the District Courts findings were found by the C. C. A. to be sustained by ample evidence.

(5) The bribery of the Superintendent constituted extrinsic fraud which would permit reopening of decrees of dismissal after the term for purpose of ordering redistribution of the amount of rate increase, which had been impounded during litigation. If relief were sought from a fraudulent judgment at law, obviously the proceeding for such relief would have to be by an original bill. But where the proceeding is in the same Court and is directed against a decree in equity, the situation is different because the Court is called to act upon its own earlier action and the original matter is already in equity. In such situations the name or form of the action is not of controlling importance; provided it affords adequate opportunity for interested parties to support and contest the relief sought.— This opportunity includes the necessary elements of due process, such as sufficient notice, production of evidence and proper hearing in other respects. Where these essentials have been preserved, procedure by motion has been approved.

In *The Bank of the United States vs. Moss*, et al., 47 U. S. 31, this Court said: (l. c. 39).

> "Besides these remedies, judgments entered up by fraud may, perhaps, on due notice, by scire facias, or otherwise, be vacated at a subsequent term by the same Court, or if offered in evidence be deemed a nullity, should fraud be clearly proved to have taken place."

In *United States, ex rel., Fisher vs. Williams*, 67 F. 384 (C. C. A. 8) the Court said: (l. c. 386).

> "We are of the opinion that where, by a mistake of the judge, induced by erroneous statements of counsel, a decree has been entered of record, which the judge did not examine or approve, and did not intend to enter, such decree may be set aside, on motion, after as well as before the expiration of the term."

Of like effect:

Fisher vs. Simon, et al., 67 Fed. 487;
United States vs. Sterling, 70 F. (2d) 708, 711, (C. C. A. 2) certiorari denied sub. nom. Commercial Trust Company vs. United States, 293 U. S. 584;
In re New England Oil Refining Co., 9 F. (2d) 344, 346, (C. C. A. 1);
Winslow vs. Staab, 242 F. 426, 431 (C. C. A. 2).

(6) When the fraud upon the Court was called to the attention of the Court by the motion for citation, it then became the duty of the Court to do all within its power to prevent the party fraudfeasors from enjoying any advantage obtained by means of their own wrong by operating on the parties who had committed the fraud in the Court.

United States vs. Williams, 67 Fed. 384, 386, (C. C. A. 8);
United States vs. Sterling, 70 Fed. 708, 711 (C. C. A. 2) certiorari denied, 293 U. S. 584;
In re New England Oil Refining Co., 9 Fed. (2d) 344, 346 (C. C. A. 1);
Winslow vs. Staab, 242 Fed. 426, 431 (C. C. A. 2).

(7) It is only necessary to operate upon the parties benefiting by the fraudulent decree and need not disturb the original judgment or decree.

Marshall vs. Holmes, 141 U. S. 589, 599, 600;
Hanna vs. Brictson M. F. G. Co., 62 Fed. (2d) 139, 148, (C. C. A. 8);

Killean vs. Maryland Casualty Co., 112 Fed. (2d) 940, 944, (C. C. A. 10);
Neblett vs. McFarland, 92 U. S. 101;
Callner vs. Greenberg, 376 Ill. 212, 33 N. E. 437, 134 A. L. R. 1485;
United States vs. Thogmartin, 98 U. S. 61.

(8) There is no conflict between the holding of the C. C. A. in this case and the holding of this Court in United States vs. Morgan, 307 U. S. 183. The chief question in the Morgan case related to the power of the Secretary of Agriculture to make an order reducing stockyard rates at Kansas City, effective from the date of an original order, which original order in an injunction proceeding had been held void because of procedural defects, to prevent the District Court from returning to the stockyard owners and operators funds collected from them under an interlocutory injunction issued by the Court in the proceeding. The secretary was left free, under the mandate of this Court, in its decision affirming the action of the lower Court, in holding that the first order was void, to promulgate a new order.

There are wide divergencies in this and the Morgan case. The Morgan case was a *pending* controversy, kept alive by a motion to stay proceedings, and the extraordinary powers and duties of the secretary under the Packers and Stockyards Act. There had been no voluntary dismissal of the cause upon agreement of the adverse parties at a previous term, as in this case. There was no bribery of one of the adverse parties to procure a settlement and a consent Court decree approving the settlement and dismissing the cause, as in this case. There was no fraud committed upon the Court, as in this case. The Morgan case does not support the position taken by petitioners herein, because the decision of the C. C. A. herein sought to be reviewed is not in conflict with it.

III.

CONFLICT WITH CASES OF OTHER CIRCUITS.

The petitioners claim that this decision in the Eighth Circuit is in conflict with these cases:

Art Metal Works vs. Abraham and Straus, 107 Fed. (2) 944, 70 Fed. (2d) 641;

Hedman Mfg. Co. vs. Todd Protectograph Co., 265 Fed. 273;

Associated Press vs. International News Service, 240 Fed. 983;

Vulcan Detinning Co. vs. American Can Co., 72 N. J. (Eq.) 387 and other cases.

The underlying facts in these cases differ so materially with the facts in these cases at bar, that we can safely contend that no conflicts exist. To begin with, in all the above listed cases, only the acts of mere salesmen and underling agents were involved. The nature of their conduct and representations were not such as could or would attract the attention of, or become known to, the managerial officers of the corporation. No funds of the corporation in those cases, as in this case, were paid out for any purpose, much less large sums, like in this case—paid out without inquiry as to the purposes for which they were to be used. The District Court found (Findings of Fact, IV Rec. A, l. c. 409) that these companies had knowledge of facts which would have put a reasonably prudent person upon inquiry as to the way Street was exercising his power as such agent; and, had reasonably diligent inquiry been made by the companies it would have discovered that Street was using improper means to secure a fraudulent agreement of settlement. Street was found by the District Court (Findings of Fact, VIII, Rec. A., l. c. 409) to be the duly authorized and acting agent of all the companies in procuring the settlement of the suits and that his powers were unrestricted. A cursory reading of the record will not only convince this Court, as it did both the District Court and the Court of Appeals, that this finding is true but that Mr. Street had

absolute charge of the litigation for all the companies and was no mere underling.

There is no conflict, and in our opinion never will be any conflict, with the principle that corporate executives can be held to have implied knowledge of facts brought home to them by refusal to make inquiry which naturally and logically is prompted by known facts.

We submit that decision in this case is not in conflict with any decision cited by the petitioners, and that there is no conflict to justify the granting of the writ of certiorari.

IV.

IMPLIED KNOWLEDGE.

Whatever fairly puts a person on inquiry is sufficient notice where the means of knowledge are at hand; and if he omits to inquire, he is then chargeable with all the facts which by a proper inquiry, he might have ascertained.

The Lulu, 77 U. S. 192: The Supreme Court said in respect to the duty to make inquiry as to the authority of a ship's master to authorize certain repairs on a ship in behalf of the owners, l. c. 201:

> "* * * It is a well-settled law that a party to a transaction, where his rights are liable to be injuriously affected by notice, cannot willfully shut his eyes to the means of knowledge which he knows are at hand, and thereby escape the consequences which would flow from the notice if it had actually been received; or in other words, the general rule is that knowledge of such facts and circumstances as are sufficient to put a party upon inquiry, and to show that if he had exercised due diligence he would have ascertained the truth of the case, is equivalent to actual notice of the matter in respect to which the inquiry ought to have been made.

McClure vs. Township of Oxford, 94 U. S. 429—McClure purchased certain bonds from a Township before the legislative act authorizing the issuance of the bonds became effective. The Court held: (l. c. 432)

> "Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence."

Duncan v. Jaudon, 82 U. S. 165—Jaudon pledged certain stocks belonging to a trust estate, of which he was trustee, to Duncan et al., to procure money for his own purposes. The stocks on their face showed that Jaudon held them as trustee. The court said: (l. c. 175)

> "The duty of making such inquiry was imposed on these parties, for it is out of the common course of business to take corporate stock held in trust, as security for the trustee's own debt. The party taking such stock on pledge deals with it at his peril, and there is no presumption of a right to sell it, as there is in the case of an executor * * * * they either knew, or ought to have known, that Jaudon was operating on his own account, and are chargeable with constructive notice of everything which, upon inquiry, they could have ascertained from the cestui que trust.
>
> "If this inquiry had been pursued they could not have failed to discover the nature and foundation of the trust, and that the trustee had no right to pledge the stock for any purpose."

Other cases on this point are:

National Surety Company v. State Savings Bank, 156 Fed., 21 (C. C. A. 8);

Shell Petroleum Corporation v. Corn et al., 54 Fed. (2d) 767, (C. C. A. 10);

Bank of Havelock v. Western Union Telegraph Company, 141 Fed. 522, (C. C. A. 8);

Angle v. N. W. Mutual, 92 U. S. 330, 342;
Union Guardian Trust v. Schram, 123 Fed. (2d) 579, p. 581;
Mishawaka, St. Joseph Loan and Trust Co. et al. v. Neu, et al., 209 Ind. 433, 196 N. E. 85;
Webb et al. v. John Hancock Mut. Life Ins. Co. et al., 69 N. E. 1006 (Ind. Sup.);
Shaw v. Aaron W. Spencer et al., 100 Mass., 382 l. c. 390;
Geyser-Marion Gold-Min. Co. v. Stark, 106 Fed. 558, l. c. 562.

V.

UNCLEAN HANDS MAXIM.

Under the unclean hands maxim, a party must not only enter a Court of Equity with clean hands but must keep them clean throughout the litigation.

Kem Products Company v. Levin et al., 117 N. J. Eq. 560, 177 Atl., 77, l. c. 79;
Gluck v. Rynda Development Company, 99 N. J. Eq., 788, 134 A, 363-366, affirmed 100 N. J. Eq., 554, 135 A. 917;
Little et al. v. Cunningham et al., 116 Mo. App., 545, 92 S. W., 734, l. c. 736.

Since the bribery of Superintendent O'Malley occurred while the rate cases were pending and were at issue, the above and many other cases which could be cited were clearly applicable. The maxim not only requires that one shall *enter* a Court of Equity with clean hands but he must *keep them clean* during the course of the litigation therein.

The rate suits, in which the funds in question were impounded, were pending and at issue when the Missouri Superintendent of Insurance was bribed to enter into the settlement and procure the entry of the Court decrees of February 1, 1936. By this bribery and the fraudulent procurement of the Court decrees, the petitioners obtained eighty per cent of the impounded funds, procured an ap-

proval by the Superintendent of eighty per cent of the 16-2/3% rate increase and disposed of all the rate suits. Now petitioners by their petition herein are seeking to have the decision of C. C. A. reviewed by this Court for the sole purpose of getting these very rate suits reinstated because they say the fraud did not relate to the matter in controversy, and petitioners' equity was not affected thereby. It is inconceivable to us how any wrongdoing on the part of a litigant could more directly relate to a matter in controversy than does the bribery of the Superintendent and the fraud upon the Court in the original rate suits. We cannot believe that the Court will seriously consider petitioners' contentions in this respect. We further believe that it is so clear that petitioners' wrongdoing directly relates to the matter in controversy that we should not burden this Court with further discussion or citation of authorities.

CONCLUSION.

We believe we have fully and effectively shown that each and every question presented and every reason advanced by petitioners for the allowance of the writ is without merit.

We respectfully submit that the Petition for Certiorari should be denied.

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PRESTON ESTEP,

Attorneys for Respondent Edward L. Scheufler (Successor) Superintendent of the Insurance Department of the State of Missouri.

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CHARLES ELMORE CROPLEY
CLERK

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 476.

AMERICAN INSURANCE COMPANY ET AL.,
PETITIONERS,

VS.

EDWARD L. SCHEUFLER (SUCCESSOR), SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, ET AL.,
RESPONDENTS.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI.

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RESPONDENTS.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI.

The Insurance Companies petition for a rehearing of the Order denying Certiorari for the following reasons:

I.

The importance of the question involved warrants granting Certiorari (*United Carbon Co. et al.* v. *Binney & Smith Co.*, decided December 7, 1942, and not yet reported).

II.

The summary proceeding employed by the Court involved procedure for which there is no precedent, and petitioners have been denied a hearing on the merits un-

der principles never heretofore determined by this, or any other, court.

III.

The circumstances were such that these petitioners could not have, and did not have, a fair and dispassionate consideration of their cases in the Circuit Court of Appeals, or the 3-Judge Court.

I.

This case involves important and novel questions which have not been, but should be, determined by this Court.

The situation presented by this proceeding is without parallel in the reported cases. Three years after these 137 cases had been settled, and final decrees entered, and more than $9,000,000 had been distributed (20% to policyholders and 80% to fire insurance companies) it was discovered that both the policyholders, the companies and the Court had been made the victims of an outrageous fraud.* The 139 fire insurance companies voluntarily, and at the first opportunity, announced to the Court their decision to return to the Court's custodian the more than $7,000,000 which they had received as the unwitting beneficiaries of this fraud and promptly complied with the order of the trial court that the funds be returned.

The 3-Judge Court entered a summary order in each case directing the companies to show cause why the money should not be distributed to the policyholders, and why the cases should not be dismissed (R. Vol. A. p. 251). This was a procedure unknown in the practice, but the

*The Insurance Companies had no reason to distrust Mr. Street who was admittedly "the foremost fire insurance personality in the western territory" (R. Vol. A. p. 365) and who represented that the money was desired for "legal Expenses" and "other Expenses of litigation," and would be accounted for, and whose reputation for honesty was nowhere questioned.

parties proceeded, filed answers in response to the orders to show cause (R. Vol. A. p. 252), and voluminous evidence was taken.

The Companies contend that the original orders of dismissal (Entered February 1st, 1936) must be deemed to have been set aside, and that if the Court had the right to deal with the fund at all, it could deal with it only on that basis. It seems to be the view of the Circuit Court of Appeals that the Companies should in any event have filed a Bill of Review, or other independent proceeding (R. Vol. V p. 24).

Widely divergent views appear as to the character of the pleadings filed by the Companies, and as to the effect of the Court's "show cause" order, particularly as to whether the Companies have properly asked for the right to try their cases on the merits.

It is submitted that the Companies, confronted by a situation for which no direct precedent is found in the books, should have the benefit of a determination by this Court of their rights. This is further accentuated by the following considerations:

(1) The Circuit Court of Appeals held that because of the "*implied knowledge*" of the Companies (the existence of which both in law and fact the Companies vigorously denied) the clean hands doctrine was applicable, notwithstanding failure to show any moral turpitude on the part of the Companies or their officers, or conscious wrongdoing, a novel doctrine never before known to have been promulgated by any Court.

(2) Aside from any consideration of the amount involved (more than $8,000,000) the importance of this question, and the imputation of fraud, as applied to corporations generally, and to these 139 Companies, which include all the largest fire insurance companies in the United States, should warrant the Court in granting Certiorari and reviewing the decision.

(3) The issues in the original suits (aside from the amount of money involved) present important questions of law as to fire insurance rate making which have never been, but should be, decided by this Court (See Point V *infra*).

II.

Petitioners respectfully submit that they did not have a fair and dispassionate consideration of their cases in either of the two courts.

The opinions in both courts show on their face evidence of indignation and resentment which made it impossible for the judges of these courts to give calm and dispassionate consideration to these cases.

The Opinion on motion for new trial concedes that the first Opinion written by the 3-Judge Court contains many inaccuracies (R. Vol. A, p. 432). And while the Opinion on Motion for New Trial holds that these inaccuracies were not material, it must, we think, be conceded that they definitely indicate an unusual state of mind on the part of the able and distinguished members of the Court.

In the Opinion on Motion for New Trial, while any intention to punish the Companies because of Street's acts was disavowed by the Court, nevertheless, it is repeatedly stated (at least eight times) that the proceeding was for the purpose of *vindicating the integrity of the Court* (R. Vol. A, pp. 435, 436, 441, 442, 483) which was wholly unnecessary and really implies punishment, and which is utterly foreign to the function of the equitable maxim that he who comes into equity must come with clean hands. In an opinion written by one of the members of the 3-Judge Court in a related proceeding the acts of Pendergast-O'Malley-Street were characterized as "exposing its judges to the possibility of disgrace and certain humiliation." *U. S.* v. *Pendergast*, 39 F. Supp. 189, 190.

The case came to the Court of Appeals surrounded with the same atmosphere, and in disposing of the appeal that Court (1) applied, we contend, an entirely unjustified and arbitrary construction of its rules as warranting it in disregarding appellants' "Points Relied Upon for Reversal," (2) criticised appellants for filing in the Circuit Court of Appeals certain pamphlets and briefs which were filed pursuant to the order of the 3-Judge Court (R. Vol. A, pp. 432, 18)* (3) without basis in the findings of the 3-Judge Court and (as petitioners contend), without the slightest supporting evidence, held the petitioners to have been participants in the Pendergast-O'Malley-Street fraud, and (4) held that Petitioners had abandoned Points to be relied upon (9), (10) and (11) by failing to discuss them in their brief. The Court said (R. Vol. 5, p. 19):

> "While Appellants set out 11 Points as being relied upon by them for reversal, they in fact, in their brief discuss only the first 8 of these Points.

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*In its Opinion the Circuit Court of Appeals states:

> "It is difficult to determine just what questions are intended to be presented, and the merits or demerits of such questions have been obscured by an avalanche of redundant, irrelevant and immaterial matter, among which is a pamphlet designated 'Parallel Column Comment' (above referred to); a similar pamphlet designated 'Outline of Mr. Bullitt's Oral Argument' (submitted in the lower court); a 33-page printed brief submitted to the lower court in these causes; a 113-page brief entitled in the same suit, designated 'Brief for the Fire Insurance Companies'; a 53-page brief entitled in the same case, designated 'Suggestions of Plaintiff Insurance Companies in Support of Their Motions for New Trial'; a 6-page brief entitled in the same suit, designated 'Insurance Companies' Reply to Memorandum for Defendant Lucas'; a 13-page brief entitled in the same suit, designated 'Plaintiffs' Reply to Counter Suggestions of Defendant Lucas, Superintendent' ".

This criticism is unwarranted. In the Opinion on Motion for New Trial, the 3-Judge Court ordered transmittal of most of these items in the following language:

> "Therefore, two things are necessary: (1) that all of the separate matters to which this opinion makes page ref-

Points (9), (10) and (11) are therefore abandoned *and will be given no further consideration"* (Emphasis ours).

These were important points. They are:

(9) The Court erred in holding that the "unclean hands" rule applied where the alleged misconduct (a) did not inhere in, or infect, the cause of action which the 139 companies were seeking to enforce, and (b) had no relation to the equity for which those Companies were suing.

(10) The Court erred in holding that the $8,132,223.51 (with interest thereon) should be returned to the policyholders, without first deciding the causes of action alleged in the 139 companies' original and Amended Bills of Complaint, and the right to the injunctions (interlocutory and permanent) therein prayed for and rendering a Decree upon the merits of the controversy so alleged between the 139 companies and the defendants (Superintendent of Insurance and Attorney General of Missouri).

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erences should, in some form, be taken to the reviewing Court; and (2) that the present paging be preserved therein.

Such matters are: (1) Transcript of Oral Argument (on May 29, 1939, on issuance of restoration and show cause orders), (2) Memorandum for Insurance Companies (filed June 24, 1939), (3) Record of evidence taken before the Special Master, (4) Report of Master, (5) Brief for Fire Insurance Companies (on merits), (6) Transcript of Oral Argument at hearing on May 20, 1940 (on merits), (7) Motion for New Trial, (8) Suggestions of Plaintiff Insurance Companies in Support of their Motions for New Trial."

In the order consolidating the cases for hearing, the 3-Judge Court ordered 7 copies of the following briefs and printed arguments to be transmitted to the Clerk of the Circuit Court of Appeals:

"Outline of Mr. Bullitt's oral argument (on motion for new trial) consisting of a reprint of the court's opinion with parallel column comments thereon;

Insurance companies' reply to Memorandum for Defendant Lucas;

Plaintiff's reply to counter suggestions of Defendant Lucas, Superintendent."

(11) The Court erred in refusing to grant each of the 139 Companies the right to a decision on the merits, and in denying interlocutory injunctions and permanent injunctions as prayed in the original and Amended Bills of Complaint.

and with the exception of the last clause in Point (11), they were discussed in the brief.

They were discussed, and necessarily discussed, throughout the brief on the law, because all of the discussion led up to the proposition asserted in the original returns of the petitioners to the show cause order that the Court could not dispose of the impounded funds without determining who owned them by an adjudication of the merits in petitioners' original suits. This question laid at the very threshold of the case (See *U. S.* v. *Bernays*, C. C. A. 8th, 158 Fed. 792; *Andrews* v. *Nat. Foundry Company*, C. C. A. 7th, 77 Fed. 774, cert. denied 166 U. S. 721).

To show that they were specifically discussed, we attach hereto planograph reproductions of Point (7) in the "Summary of Points Discussed," and Point (7) of the Brief.

Petitioners contend that in both Courts the Judges were unconsciously influenced by their abhorrence to occurrences of this kind in connection with litigation pending before them, so that petitioners did not receive the dispassionate consideration of their case to which they were entitled.

Petitioners respectfully urge that the principles of natural justice require this Court to take the Record and consider it fully and calmly, far removed from the scene of these occurrences.

We particularly call the attention of the Court to the fact that counsel for the Superintendent of Insurance conducted an exhaustive investigation in the taking of evidence, during the progress of which he called to the stand executives of the 139 Companies involved, and that as a result of prolonged hearings involving the taking of more

than 1900 pages of testimony and after the master made a careful review of the evidence, embodied by him in a Report of 679 pages, he concluded that the witnesses, [all of whom testified that they had no knowledge or suspicion of fraud] were credible, and so stated in his Report (R. Vol. IV, p. 5). After two exhaustive hearings, and two oral arguments and consideration of two sets of Briefs (on original hearing and on motion for new trial) *the 3-Judge Court found no evidence of fraud or personal guilt on the part of the executives of any Company (except Street himself).* Upon the fullest consideration, it was only by a finding of "implied knowledge" that the 3-Judge Court was able to find any basis for denying these petitioners the right to be heard on the merits of their actions.*

The Court of Appeals in its Opinion, without the recitation of any evidence, and without in any way justifying its action, for the first time, placed the stigma of "participation" in the fraud upon these Companies. The gravity of this charge, the importance of the issues of law and fact and the magnitude of the interests which are thus placed under a blanket imputation of this character, should, we respectfully submit, warrant this Court in taking the Record and subjecting it to the closest scrutiny. This is particularly true in view of the apparent difference of opinion between the CCA and the 3-Judge Court upon this question.

III.

Appellants' "points relied upon for reversal" are directed against the findings of fact and conclusions of law.

While the opinion of the Circuit Court of Appeals contains a rather perfunctory reference to the merits of

*79 of these Companies did not know that any settlement was proposed or made until after the settlement had been consummated. This is shown by the evidence and conceded in the opinion of the 3-Judge Court (R. Vol. A., p. 482).

the case, this is preceded by an extended discussion of Appellants' "Points," and a determination that these Points are either insufficient or abandoned.

In effect, we submit that the case has been determined primarily, [and incorrectly determined] upon a technicality so narrow that it should challenge the attention of this court and should be corrected. It is held that these "Points" are directed against the trial Court's opinion and not against its finding. This, we say is incorrect.

In stating its "Points relied upon for Reversal," the Appellants practically adopted (and directly challenged) the language of the Findings of Fact and Conclusions of Law made by the 3-Judge Court. Points (1) and (2) (R. Vol. 5, p. 8) are practically quotations from, and assignments of error in, Findings of Fact No. IX (R. Vol. A. p. 409) and Conclusions of Law "D" (R. Vol. A., p. 410).

Finding of Fact IX is as follows:

> "This plaintiff had knowledge of facts which would have *put a reasonably prudent person upon inquiry* as to the way in which Street was exercising his power as such agent; and, *had reasonably diligent inquiry been made* by plaintiff, *it would have discovered that Street was using improper means to secure such agreement*" (Vol. A, p. 409).

and Conclusion of Law D is as follows:

> "Under the evidence in this record and the facts as found, each and all of the companies before this Court *had knowledge of facts concerning the conduct of Street which would have put a reasonably prudent person on inquiry and, had such inquiry been pursued with reasonable diligence, the fraud upon this Court would have been prevented*" (Vol. A, p. 410).

"Points Relied Upon for Reversal" (1) and (2) in Appellant's Brief, page 44, are as follows:

> "The Court erred in holding that the Six Companies, the 60 Companies, and the 13 Companies (or

any of them) *had knowledge of any fact concerning Street's conduct, which (no matter how diligently such inquiry might have been pursued) could possibly have prevented such fraud upon the Court.*

"The Court erred in holding that *the knowledge* of the 29 New York Companies and of the 26 Hartford Companies *of certain facts concerning Street's conduct was such as would have put a 'reasonably prudent person on inquiry'; and that (a) had such inquiry been pursued with reasonable diligence would have prevented the fraud upon the Court; and (b) those Companies would have discovered that Street was using improper means to secure the Settlement Agreement.*"

Without encumbering this motion with further quotations, we desire to point out that "Points" (3) and (4) (R. Vol. 5, p. 9) likewise directly challenge Finding of Fact No. IX as to the knowledge possessed by Appellants, and Conclusions of Law "B" and "D" which relate to "imputed," "implied," or "constructive" knowledge.

Points (5) and (6) (R. Vol. 5, p. 9-10) are couched in language which is practically identical with Finding of Fact VIII (Vol. A, p. 409), and is unmistakably directed against that Finding.

Points (7), (8) and (9) (R. Vol. 5, p. 10-11) are directed against Conclusions of Law "B," "C" and "D" (R. Vol. A., p. 410).

There is not a word nor a suggestion in any of these "Points" that they are directed against the Opinion of the Court. The Circuit Court of Appeals was of opinion that a charge of error in "the holding" of the court referred to the opinion of the trial court. There is no such fine spun distinction between the use of the words "holding" and "finding."

These are not assignments of error of the kind that were considered in the cases cited in the Opinion of the Circuit Court of Appeals, in which the error assigned either expressly referred to the Opinion or was unmistakably so intended.

Thus, in *E. R. Squibb & Sons* v. *Mallinckrodt Chemical Works*, 69 F. 2d 685, the assignments of error, which were held insufficient, repeatedly asserted that the Court erred "in holding in its Opinion" the various matters complained of.

In *Jones* v. *Futrall*, 75 F. 2d 418, the record was such that the Finding itself could not be challenged, and therefore the assignments of error were held obviously to refer to reasons given in the opinion. Other cases cited are equally distinguishable.

The Circuit Court of Appeals holds that an assignment that the court erred in "holding" is not a charge of error in a "finding." This is a mere play on words and amounts to a denial of justice. As used in these "Points" the word "holding" is synonymous with "finding." There was only one point in the case, namely, whether the companies were entitled to have their rights in the impounded funds determined by a trial of their cases on the merits.

Emphasis is laid upon the fact that Appellants in their brief repeatedly referred to the two Opinions rendered in the District Court. It is a novel and unsound doctrine to hold that an assignment of error or "Point" necessarily was directed against the Opinion because the Brief discusses and criticizes the Opinion. It is a denial of justice to hold that "Points Relied Upon" are to be interpreted as referring to the Opinion because the brief itself discusses the Opinion.

IV.

Petitioners have a right to assert their claims to the impounded funds through a determination of the actions on the merits.

There is an important question decided by the CCA which, while it is implicit in the first reason urged by petitioners for the allowance of the writ, was not clearly presented. The CCA held that because petitioners had

not moved to reinstate their original suits nor filed bills for review, they were not in a position to assert claims to the impounded funds. This conclusion of the CCA is based entirely upon false premises and entirely ignores the Order to Show Cause made by the 3-Judge Court and the returns of petitioners thereto. The Order to Show Cause of necessity implied that the dismissals contained in the decrees of February 1 had been vacated, first, because the Court would have been without power to enter an order in a case unless that case was pending (*Mason* v. *Kansas City Belt Railway Co.*, 226 Mo. 212, 223, 224), and, second, because in the show cause orders the Court commanded the petitioners to show cause why the cases should not be dismissed and the impounded funds restored to the policyholders. If the cases when those orders were entered stood dismissed, it would have been absurd for the 3-Judge Court to order the petitioners to show cause why they should not be dismissed.

These proceedings were novel and without precedent in the books. They were initiated by the show cause orders of the 3-Judge Court entered in each case more than three years after entry of the final decree. The pleadings consisted of the show cause orders and the returns of the respondents thereto. In their returns the petitioners, as they had a perfect right to do and as they were led into doing, by the show cause orders, assumed that the dismissals had been vacated and they alleged that to dismiss their cases without an adjudication of the ownership of the impounded funds upon the merits of their suits would be unlawful and inequitable.

They said:

> "The Court may make distribution of the sums in its possession only according to law, to the lawful owners of said money as may be determined upon an appropriate hearing and determination of the merits of the controversy as set out in the pleadings of the respective parties, and pursuant to the evidence and

the Master's Report and Exceptions thereto" (R. Vol. A. p. 256).

They said further:

> "This Court is without power and ought not in law or equity dismiss this suit except only upon affirmation of the settlement if validity thereof be asserted by the defendants and they adhere thereto, or after a hearing upon the merits of the controversy and the determination of the court if it should upon due hearing so determine that the said bill ought to be dismissed for failure of the plaintiff to establish its case or otherwise according to the due process of the law, but that to dismiss the said cause at the cost of the plaintiff pursuant to the order to show cause is and would be an unlawful and inequitable action, and such action if by the Court taken is violative of the due process of law to which the plaintiff is entitled by the provisions of the first section of the 14th amendment of the Constitution of the United States" (R. Vol. A. p. 256).

In their prayers to the show cause orders petitioners prayed "(a) and that the defendant show cause, if any there be, why the Court should not proceed with the determination of the merits of the controversy between plaintiff and defendant as in their pleadings set forth" (R. Vol. A, p. 258).

Indeed, it is conceded by the respondents in their Brief in Opposition to the Granting of the Writ of Certiorari that the dismissals were reopened, *i. e.*, vacated, "for the purpose of ordering re-distribution" of the impounded funds. It is said in that brief (p. 24), "the bribery of the Superintendent constituted extrinsic fraud which would permit re-opening of decrees of dismissal after the term for purpose of ordering redistribution of the amount of rate increase, which had been impounded during litigation." So, not only did the petitioners assert claims to the impounded funds, but they were in a position to assert such claims.

We do not mean, as the respondent seems to think (p. 22 of his Brief), that the ownership of the impounded

funds could be determined in these proceedings. The only proceedings in which it can be determined whether or not the 16 2/3% increase was reasonable, and whether or not the order of the Superintendent of Insurance disapproving that increase was confiscatory, are petitioners' original cases. We contend and assert that the Court, having taken the impounded funds into its possession pursuant to the interlocutory injunctions in those original cases, had a self-imposed duty to determine who owned those funds (*U. S.* v. *Morgan,* 307 U. S. 183) and that the decision of the CCA, without determining whether or not petitioners had any interest in the impounded funds, ordered this very large sum of money paid to the policyholders arbitrarily and without any regard to the rights of petitioners, and thereby failed to perform this duty. In so doing the CCA's opinion is in conflict with *U. S.* v. *Morgan.*

In this regard there is no distinction between this case and *U. S.* v. *Morgan.* In that case the secretary made an order reducing rates to be charged by the market agencies at the stockyards in Kansas City, Missouri, for their services. The market agencies filed Bills in Equity in the Federal Court at Kansas City in which they claimed that the secretary in making his order had not accorded them due process and in which they claimed that the rates fixed by the secretary's order were confiscatory. For each and both reasons, they claimed in their bills that the secretary's order was void. The 3-Judge District Court, after hearing, held that the order was not violative of due process and that the rates fixed by the secretary were reasonable and not confiscatory and dismissed the bills. The market agencies appealed to this Court. This Court held that the market agencies had been denied due process by the secretary (*Morgan* v. *U. S.*, 304 U. S. 773) and remanded the case to the District Court. In the meantime, new rates had been put in force by agreement between the secretary and the market agencies and the interlocutory injunctions and the consequent

impounding of the difference between the old rates and the rates fixed by the secretary's order ceased and terminated. The secretary filed a motion in the District Court to stay the distribution of the impounded funds until he could make a new order. This Court having held that the secretary's order was void, the District Court ordered the impounded funds distributed to the market agencies. The secretary appealed to this Court and this Court held that having taken the fund into its possession under the interlocutory injunctions the District Court as a Court of Equity had a self-imposed duty to determine who owned the fund in accordance with law and justice. This was the chief question in the case. In so far as the Court dealt with the power of the secretary to make a new order fixing rates as of the date of the original order, the Court was dealing with the quality of the proof of the chief question, the ownership of the impounded funds. *U. S.* v. *Morgan*, 313 U. S. 409, 426 (dissenting opinion of Mr. Justice Roberts).

We earnestly urge this as a ground for rehearing for three reasons: *First*, because of the nature of the procedure in this case [a show cause order entered without hearing more than 3 years after final decree and returns thereto by the petitioners] is wholly without precedent; *Second*, because the Circuit Court of Appeals placed an unjustifiable interpretation upon these novel pleadings, and, *Third*, because, while the point is implicit in the first reason for the allowance of the writ set forth in our petition for certiorari, it was not clearly presented.

V.

The question of confiscation as applied to a fire insurance rate controversy involves important questions of law which have not been decided by the Supreme Court of Missouri, or by this Court, but which should be decided.

The sole issue involved in the merits of the rate controversy is whether or not prior rates were confiscatory.

The Bills of Complaint in each of the 137 cases directly present this question.

The making of fire insurance rates involves principles which are different from those involved in public utilities, and in rate making generally. No case has ever been decided by the Supreme Court of Missouri, or (so far as we are aware) by the Supreme Court of the United States, in which the issue of confiscation as applied to the process of rate making in the fire insurance field has been determined.

These cases are all fully tried and *ready for determination on the merits.* In every case the evidence has been taken and transcribed and the report of the Master filed. Five representative cases have been briefed, and were under submission for a period of more than a year before this settlement was made.

For 20 years the fire insurance companies have endeavored to get the issue of confiscation, and applicable principles, determined.

A statutory review action involving this identical 16 2/3% rate increase was filed jointly by 74 companies in the Missouri state court at the same time these 137 cases were instituted. This action was determined against the companies solely on the technical ground that the court was without jurisdiction. *American Constitution Fire Ins. Co.* v. *O'Malley,* 342 Mo. 139.

An earlier case [1926] involved a rate reduction order, which was decided in *Aetna Ins. Co.* v. *Hyde,* 315 Mo. 113, upon the issue of aggregate experience. On appeal to this court it was held in *Aetna Ins. Co.* v. *Hyde,* 275 U. S. 440, that no issue as to individual confiscation had been properly raised.

Suits based on individual experience were immediately thereafter instituted and relief denied (as to most of the companies) on the ground of estoppel. *Aetna Ins. Co.* v. *Hyde,* 34 F. 2d 185, affirmed *sub. nom. National Fire Ins. Co.* v. *Thompson,* 281 U. S. 331.

Thus, neither the Missouri Supreme Court, nor this Court, have ever decided the issues relating to confiscation as applied to fire insurance rates. The issue is one of great importance and would be determined upon a trial of the merits which petitioners are now seeking.

We respectfully submit that for all of the foregoing reasons the Court should grant a rehearing of the order denying petitioners writs of Certiorari, and that writs of certiorari be granted to petitioners as prayed.

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VII. The "unclean hands" rule (which the three-Judge Court applied adversely to the 139 Companies) cannot bar them from their right to a decision on the merits with respect to the 16-2/3% Rate Increase (p. 122, infra), because:

(1) All facts connected with the Street-Pendergast-O'Mailey fraud—and all facts of which the three-Judge Court held the 139 Companies had "implied" knowledge —(a) occurred five years after the 139 Companies filed their suits in the Federal Court asking equitable relief, and (b) have no relationship whatever to the 139 Companies' asserted right to a 16-2/3% Rate Increase (1930-1935), and to the impounded funds representing that increase;

(2) The "unclean hands" doctrine does not destroy the plaintiffs' [139 Companies'] right to the equitable relief prayed for in their Bills in Equity, where the alleged (but denied) fraudulent conduct (a) happened after the beginning of the litigation, and (b) is not required by the plaintiffs as an aid to the establishment of their original claim to equitable relief.

In Re Meyerfeld, 46 F. (2d) 665.

Shaver v. *Heller & Merz Company*, 108 F. 821 (C. C. A. 8).

Smith v. *Ajax Pipe Line Co.*, 87 F. (2d) 567, 568 (C. C. A. 8th).

Olsness v. *Home Ins. Co.*, 14 F. (2d) 907 (C. C. A. 8th).

Keystone Driller Co. v. *General Excavator Co.*, 290 U. S. 240.

Primeau v. *Garfield*, 193 F. 911.

VIII. The "unclean hands" doctrine has no application here, because in these proceedings, as defined by the three-Judge Court, the 139 Companies are actually defendants (p. 129, infra).

Shoe Co. v. *Wyble*, 261 Mo. 675.

Rude v. *Buckhalter*, 54 F. (2d) 834.

SEVENTH POINT.

The "unclean hands" rule (which the three-Judge Court applied adversely to the 139 Companies) cannot bar them from their right to a decision on the merits with respect to the 16-2/3% Rate Increase, because:

(1) All facts connected with the Street-Pendergast-O'Malley fraud—and all facts of which the three-Judge Court held the 139 Companies had "implied" knowledge —(a) occurred five years after the 139 Companies filed their suits in the Federal Court asking equitable relief, and (b) have no relationship whatever to the 139 Companies' asserted right to a 16-2/3% Rate Increase (1930-1935), and to the impounded funds representing that increase;

(2) The "unclean hands" doctrine does not destroy the plaintiffs' [139 Companies'] right to the equitable relief prayed for in their Bills in Equity, where the alleged (but denied) fraudulent conduct (a) happened after the beginning of the litigation, and (b) is not required by the plaintiffs as an aid to the establishment of their original claim to equitable relief.

[Vol. A p. 493; IV.]

Up to this point, we have devoted substantially our entire BRIEF to one factual question, to-wit, whether or not any of the Companies knew facts which should have placed them on inquiry regarding Street's conduct. We did this in order that the Court might have a clear understanding of the facts.

* * * * * * * *

There is a principle of law (not previously discussed) which, when applied to the undisputed facts in the 137 Cases, would make it unnecessary for this Court to determine any other question in the Case.

In 1930, the 139 Companies entered the District Court with "clean hands." On filing their suits a legitimate

controversy arose as to (*a*) the confiscatory nature of the old rates, and (*b*) the legality of the 16-2/3% increased rates, from which the impounded funds were accumulated.

During nearly five years of litigation, hundreds of witnesses, thousands of pages of testimony, and the Master's Reports in each case, all supported the Companies' contentions (p. 5, 28, *supra*).

There was never a suggestion that the Companies or any one else—not even Street—had been guilty of any possible kind of fraud or other wrongful conduct. The cases were simply awaiting the three-Judge Court's long deferred (14 months) decision on the Record as it stood on final submission. It all rested in the breast of the Court as a matter for legal decision. Nothing thereafter done could affect the Companies' right, or lack of right, to the equitable relief originally prayed for.

Thereafter, January—February, 1935, Street-Pendergast-McCormack-O'Malley entered into a wicked conspiracy to obtain money from the Insurance Companies under the guise of legitimate expenses for a settlement of the litigation for the purpose of enriching Pendergast—and through him O'Malley (p. 74-78, *supra;* OTIS, J.'s charge to Grand Jury, Reprint p. 63, 65, 66).

That wicked conspiracy (whether successful or abortive) (1) had no relationship whatever to sustaining the Companies' right to a decision on the merits regarding the equitable relief sought and the right to the impounded funds; (2) did not, and does not, inhere in, or in anyway aid in, the support of the Companies' causes of action, (3) was, and is, wholly *unrelated* to the plaintiffs,' or defendants' title to the impounded funds. The right or title to the impounded funds depended exclusively upon whether the old rates were confiscatory.

The validity of the old rates, or the right to the increased rates, depended upon many factors; but neither could possibly be affected, one way or the other, by the Street-Pendergast-O'Malley fraud, occurring, as it did, long *after* the increased rates were charged and collected, and

not related in any way to any of the factors controlling the confiscatory nature, or legality, of either the old or the new rates.

The Street-Pendergast-O'Malley conduct was fraudulent, criminal, contemptous of the Court, and the parties engaged in the fraud should be punished by the criminal laws.

Neither the 139 Companies, nor the policyholders, should be permitted to obtain or to retain any fruits of the fraud.

The 139 Companies on learning of the frauds repudiated the Decrees and all benefit thereunder; and restored to the Court, not merely what they received under the Decrees, but also what had been paid to the Superintendent for the State's expenses and his counsel fees (and was unrecoverable). The 139 Companies renounced, and have not retained, any fruits of a fraud to distribute the impounded funds, by a bribed agreement, instead of by a judicial decision. On the other hand, the Superintendent (*a*) *holds on* to all the fruits of the fraud,[65] and (*b*) wants to obtain *new and additional fruits* of the same fraud[66]—which, in other words, means that he wishes to obtain $8,000,000 for the policyholders as the result of the Street-O'Malley fraud.

Therefore, it is the Superintendent acting for the policyholders, and *not* the Insurance Companies, who is seeking an *"unjust enrichment"* flowing from the frauds.

With that factual understanding, what is the law regarding "unclean hands" upon which the three-Judge Court rejected the Insurance Companies' right to a decision and summarily gave the entire funds to the policyholders?

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[65]He holds on to $593,040 of the impounded funds, of which $423,600 went to pay his attorneys' fees and $169,440 to pay the expenses of his litigation (p. 16, *supra*).

[66]He desires to obtain (as the result of the fraud of his predecessor in office as a State official), the title to the rest of the impounded funds amounting to approximately $8,000,000 without any legal decision as to the ownership thereof.

The "unclean hands" doctrine does not apply here. It does not destroy a party's right to a decision on the merits, where the "unclean" acts complained of (*a*) happened during the progress of the litigation, and (*b*) were extrinsic to, and did not inhere in, the original cause of action.[67]

Even if the Companies knew of, or had closed their eyes to, the Street fraud **(which of course they absolutely deny and of which there is not a scintilla of proof)**, the "unclean hands" rule does not support the three-Judge Court's action (1) *in refusing to decide* the cases, which they had held under submission for more than a year before the fraud was committed, and (2) in ordering a summary distribution of the $8,000,000 "impoundings," to the policyholders. This is because, as stated in 4 A. L. R. (p. 60):

> "If a cause of action in its inception was meritorious, the fact that the complainant in the suit, has during its continuance been guilty of inequitable conduct, will not prevent his recovery of the relief prayed, provided such conduct 'does not go to the cause of action.' "

A party has the right to a determination of his claim on the merits, despite his *subsequent* fraudulent conduct

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[67]*Chute* v. *Wisconsin Chemical Co.*, 185 Fed. 115, 118; *In re Meyerfield*, 46 F. (2d) 665, 666; *Smith* v. *Ajax Pipe Line Co.*, 87 F. (2d) 567, 568 (C. C. A. 8th); *Small* v. *Heywood-Wakefield*, 21 F. S. 697, 700; *Barnes* v. *Barnes*, 282 Ill. 593; *Chicago* v. *Union Stock Yards & Transit Co.*, 164 Ill. 224; 1 Pomeroy's Eq. Jur. 5th Ed., Sec. 399; 10 R. C. L., Sec. 140; 4 A. L. R. p. 60; *Trice* v. *Comstock*, 121 Fed. 620 (C. C. A. 8th); *Olsness* v. *Home Ins. Co.*, 14 F. (2d) 907 (C. C. A. 8th) *Oscar Barnett Foundry Co.* v. *Crowe*, 219 Fed. 450 (C. C. A. 8th); *American Sugar Refining Co.* v. *McFarland*, 229 Fed. 284, affirmed 241 U. S. 78; *Camors-McConnell Co.* v. *McConnell*, 140 Fed. 412 (C. C. A. 8th); *Talbot* v. *Independent Order of Owls*, 220 Fed. 660 (C. C. A. 8th); *Baker* v. *McCarl*, 24 F. (2d) 897; *Cunningham* v. *Pettigrew*, 169 Fed. 335 (C. C. A. 8th); *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240; *Stegman* v. *Weeks*, 279 Mo. 131, 139; *Bateman* v. *Fargason*, 4 Fed. 32, 33; *Goodyear Tire & Rubber Co.* v. *Overman Tire & Cushion Tire Co.*, 95 Fed. (2d) 978.

in attempting to get all, or a part, of his claim by wrongful methods. The Courts customarily apply that principle without comment.[68]

There is a proper way [through indictment] to punish such conduct; but such punishment does not permit closing the Court's doors even to a guilty party.

In Re Meyerfeld, 46 F. (2d) 665, Meyerfeld, the bankrupt, held some property in his name which was actually owned by Levy, who had furnished the money for its purchase. Meyerfeld's Trustee in Bankruptcy proposed to sell all property standing in Meyerfeld's name, including the property that was claimed by Levy. In attempting to prove that the property belonged to him, Levy produced a forged deed conveying the property in question from Meyerfeld to himself. But Levy had actually paid for the property, and was entitled to a resulting trust. The Referee refused to enforce a resulting trust in Levy's behalf, because of his "unclean hands" in forging the deed. The Court overruled the Referee, enforced the trust, and held that Levy was not barred because of the "unclean hands" doctrine, saying (p. 666):

"Reprehensible though Levy's conduct may have been, I am constrained to hold that the referee erred in denying him all relief because he came into equity with unclean hands. *The transaction by which the resulting trust was created was not tainted with fraud, illegality, or unconscionable conduct on his part* . . .

"The applicable principle is well stated in *Barnes* v. *Barnes*, 282 Ill. 593, where a plaintiff had fabricated evidence to support various items in an account, but had established her right generally to an accounting in equity; 'He who comes into a court of equity must come with clean hands, and one who does iniquity cannot have equity; but *that maxim is limited in its application to*

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[68][*White* v. *Crow*, 110 U. S. 183, 187; *National Surety Co.* v. *State Bank*, 120 F. 593, 598-599 (C. C. A. 8th); *William Lane, Inc.*, v. *Shelby Shoe Co.*, 45 F. (2d) 581, 582 (C. C. A. 2d).]

where the substance of the thing is inequitable, and the iniquity must apply to the particular subject-matter. It is not sufficient to bar relief that inequitable conduct should relate to the proof of some item or some fact, and *where the origin of the claim is not inequitable, a fraudulent act in relation to it will not bar relief*" [Citing cases].

This misconduct, which will repel a plaintiff from a court of equity, must inhere in, and infect, the cause of action which the plaintiff seeks to enforce. It must have an immediate and necessary relation to the equity for which the plaintiff prays in respect of the matter in litigation. The "unclean hands" doctrine cannot be applied where the alleged misconduct (i) occurred *after* the institution of a suit and (ii) had *no relation* to the equitable relief which the plaintiff sought. In *Primeau* v. *Garfield,* 193 F. 911 (cited by the three-Judge Court in its opinion), the Court said:

> "The real test in such a case as this is whether the plaintiff requires any aid from the fraudulent transaction to establish his demand."

In *Shaver* v. *Heller & Merz Company,* 108 F. 821 (C. C. A. 8), the Court said (p. 834):

> "The principle that 'he who comes into equity must do so with clean hands' is familiar and indisputable. But it does not repel all sinners from courts of equity, nor does it disqualify any complainant from obtaining relief there who has not dealt unjustly in the very transaction concerning which he complains. The iniquity which will repel him must have an immediate and necessary relation to the equity for which he sues."

The three-Judge Court argued that it would be fantastic to *have the power* to throw a case out of court, because the plaintiff *entered* with "unclean hands," and yet not to have the *power* to throw the plaintiff out of Court, if the unconscionable conduct occurred *after* it was filed, but while the case was still progressing before the Court.

That argument is "bad law"; and it is opposed to the settled principles of equitable jurisprudence, which the three-Judge Court must follow; and it cannot create new concepts contrary to the established rules of equity.[69]

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[69]21 C. J., Sec. 12, p. 34, 35, and note 7-A.